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RECORD
VOL. I.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT.

Nos. 15,698, 15,699 and No. 15,700.

CIVIL.

NAOMI WOOD, *Appellant*, vs. THE GAS SERVICE COMPANY, *Appellee*.	No. 15,698.
ALFRED F. MARTIN, *Appellant*, vs. THE GAS SERVICE COMPANY, *Appellee*.	No. 15,699.
BILTWELL COMPANY, INC., TIPTON MANUFACTURING CO., GLENRIDGE TROUSERS COMPANY, AND EMBASSY MANUFACTURING COMPANY, *Appellants*, vs. THE GAS SERVICE COMPANY, *Appellee*.	No. 15,700.

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HONORABLE ALBERT A. RIDGE, JUDGE.

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These three cases were consolidated for trial. The Martin case was begun on March 15, 1955, by the filing with the Clerk of the Circuit Court of Jackson County, Missouri, of a petition. The Wood case was begun on March 22, 1955, by the filing of a complaint in the United States District Court for the Western Division of the Western District of Missouri. The Biltwell case was begun on October 13, 1955, by the filing with the Clerk of the Circuit Court of Jackson County, Missouri, of a petition. To avoid repetition, the pleadings, orders and filings in the Martin case only are reproduced herein. The Martin case was tried on an amended complaint as follows:

AMENDED COMPLAINT.

Comes now the plaintiff and for his cause of action against defendant states:

I.

Plaintiff is a resident of Tipton, Missouri, and is the owner of the real estate and personal property hereinafter described. Defendant is a corporation, duly organized and existing at law, and at all times mentioned herein was engaged in the business of selling natural gas to consumers in Tipton, Missouri, and in operating and maintaining a gas distribution system for that purpose.

II.

On or about January 31, 1955, due to the negligence and carelessness of defendant, an explosion and fire took place in a building owned by the plaintiff in Tipton, Missouri, causing loss and damage to plaintiff as hereinafter set forth.

III.

Defendant was careless and negligent in the following respects:

(a) Defendant caused and permitted natural gas to escape from a gas line, which was owned by defendant or under its control, leading to plaintiff's building and to enter into said building.

(b) Defendant failed to maintain said gas line in a leakproof condition.

(c) Defendant failed to inspect and test said line for the purpose of discovering leaks.

(d) Defendant permitted said gas line to remain in a defective condition after it knew or should have known of said defective condition, and failed to repair or replace said defective gas line, and failed to warn plaintiff of said defective condition and failed to shut off the supply of gas until said defective condition could be repaired.

IV.

Even if the said pipe was owned by the customer (which plaintiff denies), defendant was negligent in failing to repair said leak, or warn plaintiff of said leak, or shut off the gas supply, after defendant knew of said leak, or should have known of said leak.

V.

Due to all the aforesaid negligent acts and omissions of defendant, and to each of them, natural gas was caused and permitted to enter plaintiff's building wherein it accumulated and exploded, and a fire resulted, and the following property belonging to plaintiff was thereby destroyed or damaged: a two-story brick building located on Lots 16 and 17 on Moniteau Street in Tipton, Missouri, was damaged in the amount of Twenty-six Thousand and no/100 Dollars ($26,000.00); a two-story brick building of the value of Seven Thousand Five Hundred and no/100 Dollars ($7,500.00), located on Lot 16, Moniteau Street in Tipton, Missouri, was completely destroyed, and was damaged in the sum of Seven Thousand Five Hundred

and no/100 Dollars ($7,500.00); a one-story building located on Lot 16 in Tipton, Missouri, was damaged in the amount of Three Thousand and no/100 Dollars ($3,000.00). Plaintiff has suffered and will suffer a loss of income and rental from the aforementioned damaged, but not destroyed, buildings in the amount of Two Thousand and no/100 Dollars ($2,000.00).

VI.

In addition to the damage and loss to plaintiff of the above real property plaintiff also suffered, due to the aforesaid carelessness and negligence of defendant, loss and damage to personal property, including machinery, furniture, equipment, appliances, clothing and other items, in the amount of Thirty-two Thousand and no/100 Dollars ($32,000.00).

VII.

All of the said damage and loss suffered by plaintiff was directly caused by the negligence of defendant aforesaid.

Wherefore, plaintiff prays for judgment against the defendant in the amount of Seventy Thousand Five Hundred and no/100 Dollars ($70,500.00) and for his costs herein.

The complaints in the Biltwell Company, Inc., et al. and Naomi Wood cases are identical as to allegations of negligence. The only difference in the complaints is that in those cases the parties were tenants, while Martin was the owner, of the buildings, and suffered different damages, which is not in issue. Therefore, those complaints have not been reproduced in full here.

REMOVAL TO THE UNITED STATES DISTRICT COURT.

In the Martin case service of process and a copy of said petition filed in the Circuit Court of Jackson County,

Missouri, having been made on defendant March 15, 1955, said cause was on defendant's petition and bond for removal duly removed to the United States District Court for the Western Division, Western District of Missouri, on March 28, 1955, on the ground of diversity of citizenship, plaintiff being a citizen of Missouri and defendant being a citizen of Delaware.

In the Biltwell case service of process and a copy of said petition filed in the Circuit Court of Jackson County, having been made on defendant October 13, 1955, said cause was on defendant's petition and bond for removal duly removed to the United States District Court for the Western Division, Western District of Missouri on October 27, 1955, on the ground of diversity of citizenship, plaintiff being a citizen of Missouri and defendant being a citizen of Delaware. (The removal papers are omitted inasmuch as removability of the cause is not in issue.)

DEFENDANT'S ANSWER.

Answer of Defendant Gas Service Company to Plaintiff's 1st Amended Complaint

Filed April 24, 1956.

First Defense.

Comes now the defendant and for its first defense to plaintiff's Amended Complaint, states that the Court on objections of defendant to the filing of the amended complaint because of indefiniteness as to the place of the alleged gas leak, entered an order making statements made at a pre-trial conference on January 27, 1956, a part of the complaint, which order is as follows:

"Order.

By leave of court, plaintiffs file amended complaints, subject to theory of parties, stipulations and statements made at pre-trial conference as shown by

transcript of record of proceedings had at such conferences and filed herein on February 4, 1956.

Defendant is given ten (10) days to file answers."

That on the pre-trial hearing on page 2 of the record the following appears:

"The Court: Now, suppose you give me your theory of the case, Mr. Randall. You represent the plaintiffs in all three of the cases?

Mr. Randall: Yes, sir. That the explosion was caused by natural gas which had escaped from a hole in a pipe, located between defendant's curb stop cock and defendant's meter on the side of Mr. Martin's building, and that the defendant knew or should have known of the condition of that pipe and should have either repaired it or warned the plaintiff of the condition and shut off the gas, while repairs were being made."

Defendant further states that the Amended Complaint construed with the above statement of the attorney for plaintiff on the pre-trial hearing fails to state a claim showing plaintiff is entitled to the relief prayed for, or to state facts sufficient to constitute a cause of action against defendant.

Second Defense.

a) Answering paragraph I of the Amended Complaint, defendant admits the allegations thereof.

b) Answering paragraph II of the Amended Complaint, defendant denies the allegations thereof.

c) Answering paragraph III of the Amended Complaint, defendant denies the allegations thereof.

d) Answering paragraph IV of the Amended Complaint, defendant denies the allegations thereof.

e) Answering paragraph V of the Amended Complaint, defendant denies the allegations thereof.

f) Answering paragraph VI of the Amended Complaint, defendant denies the allegations thereof.

g) Answering paragraph VII of the Amended Complaint, defendant denies the allegations thereof.

Third Defense.

Further answering and for third defense, defendant states that on or about November 4, 1938, the then abutting property owner on Moreau Avenue, J. J. Hilbert, so as to obtain natural gas for his property and premises in question, installed at his expense the gas pipe between the curb stop cock and the meter above referred to and continued to own and control the same, until November 9, 1942, when plaintiff, by purchase acquired from said Hilbert the abutting property and premises in question, including the said gas pipe as appurtenances to the realty conveyed and continued the use of the said pipe and gas appliances to serve his property and premises until after January 31, 1955, assuming all the rights and obligations as a gas consumer and customer; that under the gas franchises of the city of Tipton, and the rules and regulations then in effect on the respective dates and duly filed with and approved by the Missouri Public Service Commission, it was the duty and obligation of the owner Martin of the premises, and as a gas consumer and customer to maintain the said gas pipe in a safe, efficient and proper operating condition and at his expense and make such repairs as were required; that if the alleged explosion or fire was caused by a leak in the said gas pipe such was not due to any negligence of defendant, and bars any recovery herein by plaintiff.

Fourth Defense.

Further answering and for fourth defense, defendant states that if plaintiff was damaged as alleged in his amended complaint, such was directly due and caused in whole or in part to the acts and negligence of the plaintiff in failing to keep the building in reasonably safe condition from collapse, and the appliances therein in safe, efficient and proper operating condition, including the

said gas pipe from the curb stop cock to the building, all of which directly caused or directly contributed to cause plaintiff alleged damages and bars any recovery herein.

Fifth Defense.

Further answering and for fifth defense, the defendant denies that plaintiff is the real party in interest, and states that he has no right or authority to maintain this suit or if he is a real party in interest as to a part of the alleged damage claimed therein there are other real parties who have a substantial interest in the alleged cause of action and alleged damages who have not been made parties to this suit and should be joined as real parties plaintiff; that said other parties are certain insurance companies, to-wit: the Milwaukee Insurance Company of Milwaukee, Wisconsin, and Firemen's Insurance Company of Newark, N. J., which issued and carried on the allegedly damaged property of plaintiff fire and explosion policies of insurance, which said companies shortly after the fire paid plaintiff under said policies in settlement the sum of $30,500 and took from plaintiff an executed assignment instrument assigning or subrogating over to said insurance companies all his rights and interest in and to any alleged claim or cause of action by reason of the alleged fire and explosion, against any third party such as defendant in this alleged action to the extent of $30,500; that the amended complaint should show all the real parties in interest and reveal the actual interest thereof of each, and if plaintiff is suing or attempting to sue as a trustee herein, he should disclose the trusteeship and the respective interest of all beneficiaries; that the failure of plaintiff Martin to join all the real parties in interest and to reveal their actual interest in the suit and proceeding constitutes a violation of the real party in interest statute and the law, and bars any recovery by plaintiff.

Wherefore, defendant prays to be discharged and go hence with its costs in this behalf expended.

(Filed in the United States District Court May 4, 1956.)

The answers in the Biltwell and the Wood cases are the same as in the Martin case as to the issues of liability, except that the real party in interest defense was not asserted against Naomi Wood.

The following verdict was returned in all three cases:

We the Jury in the above entitled cause, find the issues here in favor of the defendant and against the plaintiffs.

/s/ W. C. Kamberg,
Foreman of the Jury.

(Filed in the United States District Court September 14, 1956.)

JUDGMENT.

It is further Ordered, Adjudged and Decreed by the Court that the plaintiff, Alfred F. Martin, in Case 9689 take nothing by reason of his complaint, but the defendant, the Gas Service Company go hence herefrom without day and have and recover of the plaintiff its costs herein paid out and expended and have execution therefor.

(Entered in the United States District Court September 14, 1956.)

(The same judgment was entered in the other two cases.)

PRE-TRIAL ORDER.

At a pre-trial conference held in the above-entitled causes, the parties appearing by their respective counsel, the following proceedings were had:

It being made to appear to the Court that a common question of law and fact is involved in each of the above

cases, IT IS NOW ORDERED BY THE COURT that the same be, and they are hereby, consolidated for trial before a single jury.

By leave of Court, plaintiffs will make amendment to each of the above complaints, charging that defendant failed to warn plaintiffs of the defective condition of the gas pipe in question and failed to shut off the supply of gas until said defective condition could be repaired.

Defendant's objections to Interrogatories 27, 30, 32, 33, 35, 36, 37, 38, 39, 40, 43, 44, 45, 46, 49, 51, 52 and 53 are by the Court sustained.

After defendant makes answer to remaining interrogatories propounded by plaintiffs, plaintiffs will submit request for admissions of fact herein. An issue presently exists between the parties as to the ownership of the gas pipe from which plaintiffs contend gas escaped into the building referred to in the pleadings. Prior to the next pre-trial conference herein, the parties will endeavor to resolve such question of ownership.

The parties will stipulate at the next pre-trial conference as to the use of depositions and other discovery matter in each of the above cases.

Plaintiffs will file with the Court at the next conference, an itemized statement of the personal property and the damage thereto, involved in Cases 9684 and 10055. In Case No. 9689, plaintiff will itemize the amount of loss claimed to the premises, and other special damages.

Plaintiffs are given leave to inspect and photograph the gas pipe removed by defendant after the explosion in question.

All discovery procedure should be completed herein within twenty (20) days from this date.

This cause is set for further pre-trial conference on Friday, February 24, 1956, at 2:00 o'clock P. M.

It is ordered that the trial of this cause be governed by the above stipulations and agreements, unless modified by the Court to prevent manifest injustice.

(Signed) Albert A. Ridge,
Judge.

Dated at Kansas City, Missouri, this 27th day of January, 1956.

PRE-TRIAL ORDER.

At a pre-trial conference held in the above-entitled causes, the parties appearing by their respective counsel, the following proceedings were had:

Plaintiffs are given leave to file amended complaint in Cause No. 10055, supra, and to amend the complaints in Causes 9684 and 9689 by interlineation.

By the above actions plaintiffs seek to recover damages as the result of an explosion and fire which took place in a building in Tipton, Missouri, in which the plaintiffs had, at the time, certain personal property. It is plaintiffs' contention that the explosion was due to the negligence on the part of defendant in permitting natural gas to escape from a gas pipe owned by defendant leading into the building in question, or that, if said gas pipe was not owned by defendant, defendant had knowledge of circumstances and conditions from which it should have known that gas would escape therefrom.

Defendant denies that it was the owner of the gas pipe from which any alleged gas escaped into the building in question, and denies that it had any knowledge of any circumstances that would put it on notice that gas was escaping from said pipe.

The parties will undertake to stipulate, within fifteen (15) days from this date, the ownership of the premises and the sidewalk immediately adjacent thereto and under which the gas pipe in question was located, and submit the issue of ownership of said premises and sidewalks adjacent thereto to the Court for determination prior to the trial of this cause upon the facts so stipulated; and file briefs on said issue with the Court at the time of the filing of said stipulation.

Defendant's Exhibit 1, here marked, is rules and regulations for gas service in the City of Tipton, Missouri, filed with the Public Service Commission of Missouri on December 21, 1931, adopted by defendant on October 1, 1947.

Defendant's Exhibit 2, here marked, is schedule of rules and regulations covering furnishing of gas in Tipton, Missouri, filed with the Public Service Commission of Missouri on January 1, 1952.

Plaintiff's Exhibit 3 is an itemized list of damage claimed by plaintiff Naomi Wood in Case No. 9684.

Plaintiffs' Exhibit 4 is an itemized list of damage claimed by plaintiffs in Case No. 10055.

Plaintiff's Exhibit 5 is an itemized list of damage claimed by plaintiff in Case No. 9689.

The plaintiffs will submit to defendant supporting data as to the damage claimed in each of the above exhibits, to the end that the parties may stipulate with respect to damages claimed by the plaintiffs in the above cases.

Plaintiffs' Exhibits 6 to 15 herein are photographs of the Martin Building in Tipton, Missouri, in which the plaintiffs had personal property at the time of the occurrence in question, said photographs being taken before and after the explosion and fire in said building.

Exhibits 1 and 2, and 6 to 15, inclusive, are now admitted in evidence and made a part of the record in this cause.

A transcript of the proceedings had at this pre-trial conference may be referred to by the parties in explanation of proceedings had at this conference.

The issues to be determined at the trial of this cause are: (1) ownership of the gas pipe from which plaintiffs claim gas escaped at the time of the occurrence in question; and (2) duty and negligence, if any, on the part of defendant to inspect and maintain said gas pipe.

This cause is set for trial on Monday, May 14, 1956, at 10:00 o'clock A. M.

Plaintiffs will file trial brief with the Court ten (10) days prior to trial. Defendant will file trial brief with the Court five (5) days prior to trial.

It is ordered that the trial of this cause be governed by the above stipulations and agreements, unless modified by the Court to prevent manifest injustice.

(Signed) Albert A. Ridge,
Judge.

Dated at Kansas City, Missouri, this 29th day of February, 1956.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION.

NAOMI WOOD, *Plaintiff,* vs. THE GAS SERVICE COMPANY, a Corporation, *Defendant.*	No. 9684.
ALFRED F. MARTIN, *Plaintiff,* vs. THE GAS SERVICE COMPANY, a Corporation, *Defendant.*	No. 9689.
BILTWELL COMPANY, INC., a Corporation, TIPTON MANUFACTURING COMPANY, a Corporation, GLENRIDGE TROUSERS COMPANY, a Corporation, and EMBASSY MANUFACTURING COMPANY, a Corporation, *Plaintiffs,* vs. THE GAS SERVICE COMPANY, a Corporation, *Defendant.*	No. 10055.

REPORTER'S TRANSCRIPT OF ALL EVIDENCE AND PROCEEDINGS AT THE TRIAL.

Be It Remembered that heretofore, on Monday, the 10th day of September, 1956, the above-entitled causes came on

regularly for hearing before the Honorable Albert A. Ridge, one of the Judges of said court, and a jury, at Kansas City, Missouri.

The Plaintiffs were represented by their counsel, Hogsett, Houts, James, Randall & Hogsett, Kansas City, Missouri, by Messrs. J. D. James, Alvin C. Randall and Thaddeus McCanse; and Mr. Frank Quigley, Tipton, Missouri.

The Defendant was represented by its counsel, Messrs. Charles M. Miller, Don M. Jackson and Richard L. White, Kansas City, Missouri.

(Whereupon, the following proceedings were had and entered of record:)

(A jury was duly selected and sworn to try the consolidated causes; whereupon counsel for the respective parties made opening statements to the Court and jury.)

PLAINTIFFS' EVIDENCE.

EARL R. PRIEGEL, by deposition, on behalf of plaintiffs testified:

Direct Examination.

I live in California, Missouri, and I am a registered land surveyor. At the request of plaintiffs I prepared a survey of a portion of the city of Tipton, Missouri, including the intersections of Moreau and Moniteau, Osage and Moniteau, Morgan and Osage, and Moreau and Morgan Streets. The survey included the block on which the Martin buildings stand. They stand at the west end of Block C. Exhiibt 16 is the survey that I prepared.

The northwest corner of the Martin building, designated "X" on Exhibit 16 is 1.35 feet west of the true boundary of Block C. The southwest corner of that building extended 1.10 feet west of the line marking the west boundary of Block C and the east boundary of Moreau Street. At the center of the Martin building, that is, at a point halfway between the northwest corner and the southwest corner of the building, I found that the wall was .90 feet west of the east edge of Moreau Street and the west edge

of Block C. The distance that the wall extended west of the east edge of Moreau was established by my survey.

Exhibit 16, being the survey, was admitted in evidence.

Exhibits 17 and 18 are plats which I prepared showing the location of various gas pipes with relation to the Martin building and with relation to Moniteau and Moreau Streets. (Exhibits 17 and 18 are admitted in evidence subject to proof of the measurements and other data shown thereon.) The sidewalk along Moreau Street and adjacent to the factory building is seven feet six inches wide. I could not see the gas pipes under the ground and they were established by information furnished me by the plaintiffs. I could see where the gas pipes had been cut off where they came up through the sidewalks, and I could see a strip across the sidewalk where the concrete had been patched. The only pipe I saw was the cut off ends of a pipe just south of the building line. Exhibit 17 is drawn to a scale of one inch to five feet. Exhibit 18 is the profile of the west side of the building wall showing the sidewalk, pipe and meter box.

The north and south gas pipe shown in red and designated "Gas Main" (Exhibit 17) was located two feet out from the curbing on the west side of Moreau Street. Where I show the two-inch gas pipe that crosses Moreau Street and then branches off north and south for some distance on the east side of Moreau Street, I located it 160 feet north of the alley. I was told that the two-inch pipe extended east from the main to a point two feet west of the east curb, and branched north and south at that point. From these figures, and by measuring to the center of the concrete patch north, and by measuring the distance to the old pipe to the south, I was able to show the location of the underground pipe.

Exhibit 18 is a profile of the west side of the building wall showing the sidewalk, pipe and meter box, The gas pipe and the outline of the meter box is shown in red. The riser that extends downward from the meter box is drawn eight inches out from the building and 29 inches long. Then I showed an "L" connection and extended the pipe the width of the sidewalk 7.6 feet and two feet into the street. Exhibit 18 is drawn to a scale of one inch to one

foot. The riser is 29 inches from the surface of the sidewalk down to the "L" connection.

VINCENT HECHT, on behalf of plaintiffs, testified:

Direct Examination.

I am a pharmacist in Tipton, Missouri, and I am also the chief of the volunteer fire department. I was called to a fire in Tipton between 2:15 and 2:30 a. m. on January 31, 1955. When I arrived I could see that the northwest corner of the Martin building was down. The northwest corner of the roof was down and was afire. The north wall was standing, but was leaning slightly to the north, and we had it pulled down.

Exhibit 19 shows the north wall in the process of being torn down. Exhibit 13 shows the west wall after the fire was put out. We pulled that roof sideways like that. Exhibit 13 was taken before Exhibit 19. Exhibit 20 shows the north side of the building as it looked when we were still fighting the fire. The light colored marks on the windows are flame on the window sills, but that is all because there is nothing inside. Exhibit 21 shows the west side of the building and shows its condition sometime after I arrived. (Exhibits 13, 19, 20 and 21 are admitted in evidence.)

After we had things pretty well under control, I saw a door to the west of the Martin building by the Gabbert Garage and there was a door to the north of the Martin building by the Skelly Oil Company. I could not say that I saw marks on those buildings, and I do not remember the condition of the doors.

There were several men from the gas company making a test and I was asked to witness the test. It was made by the Veatch Construction Company, The Veatch Construction Company building is just to the rear of the Martin office building. The south line running across the sidewalk is the one that was tested. He put on an instrument that resembled a tire pump with a gauge. He attached it to the pipe on the west side of the meter be-

fore it went into the meter. He attached it right at the meter, not to the meter, but to the pipe. He pumped it up to fifteen pounds according to the gauge, and it remained constant during the three or four minutes that I watched it.

Cross Examination.

The test was made at two or three o'clock the next afternoon. I would say that the test was made somewhere between thirty and forty feet from the northwest corner. The pipe was originally hooked to the meter, but they took it loose to make the test.

I was at home when I received notice of the fire, about three and one-half blocks from the scene of the fire. I went to the City Hall which is about two and one-half blocks from my home and about one block from the fire. I went to the scene by myself in a fire truck. The building was all ablaze when I arrived and the second floor had fallen down. The roof had fallen to the ground. The second floor was down on the first floor and was burning.

I think the doors I saw were solid, with no glass, but I am not sure. I made no special trip to see the doors. I was walking by and saw them. One was on the west of the building and one was on the north of the building. I didn't pay any attention to the doors when I first got to the scene. It could have been a couple of hours afterwards that I noticed the doors. One truck got to the scene before I did. I do not know whether the doors had been moved. All I know is that I glanced over there and saw them about two hours afterwards. I would not say it was two hours afterwards, but it was after the fire was pretty well under control.

We kind of pulled the roof over as shown in Exhibit 13. I think we pulled it to the west. We hooked a truck onto it. I don't remember what its position was before we started pulling it. There was a lot of brick over the sidewalk and meter. At the point where the meter was the brick was three or four feet high. The brick was there before we pulled the roof over. It was brick from the west wall. It also covered the sidewalk clear out to the curb.

The lights in Exhibit 20 are fire. The fire is located in the front of the second story about four feet from the floor. I would say it is the top window sill of the second floor. I cannot recall any fire in the first floor. The fire was in the top of the second building from the corner and burned back up under the roof to the east. I do not believe that Exhibit 20 indicates that part of the front wall is out. Exhibit 21 shows the fire which is on the inside of the building. It shows fire in six different places. I did not see this when we first got to the scene. That was after some of the rubble was cleared away, several hours after we arrived. The rubble was brick and wood.

Mr. McGee was the man who ordered the test made and called me over to witness it. It was about 2:30 in the afternoon of Monday the 31st. I left there about 6:00 that morning and went back about the middle of the morning. The telephone company and the gas company were working at the scene when I came back. When I speak of the curb I mean the outer edge of the sidewalk.

The Martin building was constructed of brick and the floors were of wood. I would say that the west room, referred to as the office was twenty feet wide and fifty feet north and south.

Re-Direct Examination.

The first building on the west, the office building, was about twenty feet wide, and the second floor of that building had collapsed sometime before the picture was taken. The second floor of the second building from the corner where the sewing machines were kept was still intact.

Re-Cross Examination.

By intact, I mean they were still in a horizontal position. The roof was off of the office part of the building, but was not off of the second building from the corner. That was where the fires were burning near the roof. Exhibit 13 shows the west wall of the room immediately east of the office building to be partially down. I think the roof is indented down. The front wall was not down on

that second room. Part of the west wall of the second building is out according to the picture.

Re-Direct Examination.

The floor of the second story which would be the ceiling of the first story of the second building from the corner was still in a horizontal position when the fire was put out.

J. J. BRANT, on behalf of plaintiffs, testified:

Direct Examination.

I live at Tipton, Missouri, and am District Manager for the United Telephone Company. My office at one time was located on the second floor of what is known as the Martin building. Pretrial Exhibit 15 is a picture of the Martin building. We occupied the second floor on the Moreau Street side of the building. The meter shown in the picture is a meter that was in existence there at least some of the time that our office was located in the building. When the telephone office was there there was an outside stairway that led down to the street.

I have been with the telephone company in Tipton for a total of forty-two years. We moved out of the second floor quarters to a building which was attached to the south of the building which we had previously occupied. When we moved to the first floor quarters we had natural gas service in the second floor quarters from which we moved. I think the meter shown in the picture is the one from which we received service.

I think gas came to Tipton in 1932 and I believe that we received it in our second floor quarters as one of the first users. I would say that we had had gas ever since 1933. I don't remember whether the line that was put in from the main to give us service clear up to the meter was all put in at the same time or at different times. I do not know who put the line in, but the telephone company did not put it in. It was someone other than the customer.

I think at one time the gas company would lay your line to your residence for one dollar. At the time the service was put into the telephone company and the meter put right next to the outside of the building there was about two and one-half feet of dirt at the edge of the building, which was later covered by a sidewalk. The outside stairway was taken down sometime after we moved from that space. It was after 1938.

Cross Examination.

I would not know whether the service that I knew originally came in off the alley and ran up the property line and into the building for the telephone company. I do not remember whether the gas line back in the alley in back of the building came into the building from the alley. I could not definitely say when that meter was put in, without some records. I do not remember whether, when the meter was put in, they ran any kind of line across the street. I do not know who put that line in. I do not know whether a plumber put the line in or just who did it. I cannot say that the gas company put it in. I just don't know who paid for it or who put it in.

Re-Direct Examination.

I do know that my company did not put it in and I am just giving my best recollection.

Re-Cross Examination.

The telephone company did not send somebody down to excavate and put in the pipe in there. That is all I am saying.

MARTIN S. BATTLES, on behalf of plaintiffs, testified:

Direct Examination.

I live in Tipton, Missouri. I was night marshal in Tipton in January of 1955. On the night of January 31, 1955, I heard a noise, a kind of a thud; I don't know just how you would explain it. I was about one block from the

Martin building when I heard the first noise. I was walking away from the building at the time facing east. I turned around to see what I could see, and I did not see anything. I walked over to the depot where there was a truck that had just pulled in and I thought it had hit a railroad car, but it had not. I went maybe one hundred feet to the depot. I then went on up the street and I was at the Ford Garage when I heard the second noise. She exploded and fire followed that. That noise was considerably louder than the first. I was about one-third of a block from the Martin building at that time and across the street. I saw the fire, then I turned in the alarm.

I later went back to the scene of the fire, and I saw a door lying west of the Martin building at Gabbert's Garage. (Identifies Exhibit 10 as a picture of Gabbert's Garage.)

I had been at the Martin building before .I heard the first noise. I had just walked about one block from the building when I heard the first noise. I had checked the building to see if the doors were locked, and they were.

Cross Examination.

The noise was a kind of a thud, it was very loud. In a way, it sounded like a cracking or breaking. I ran over to the depot and right back when I saw everything was all right and had gotten to the Ford Garage. The Ford Garage was about one-third of a block from the factory on the opposite side of the street. It was about 100, 125 or 150 feet from where I was when I heard the first noise to the depot. I just whirled around and came right back running. I wouldn't know how long it took me to cover the distance that I covered between the two noises, maybe three minutes, something like that. After the second noise I saw the fire and stuff flying from the factory. It seemed like the flames were going north and northwest. I went home to tell my wife what had happened and came back to the scene in a few minutes.

I do not remember seeing a door on the north of the building. I do not know whether the door I saw on the west had glass in it. I do not know how it got there. I

do not remember what kind of door it was on the north of the Martin building leading to the apartment. The fire that I saw came out of the roof on top on the northwest corner, it seemed like.

Re-Direct Examination.

When I heard the second noise I was standing in such a position that I could not see the west side of the building. I could not see whether there was anything blown out there, doors or anything else. From the time of the blast I ran 100 or 150 feet to the depot, then ran back about 200 feet when I heard the second noise.

Re-Cross Examination.

I did not see any fire after the first noise.

MELVIN FRY, on behalf of plaintiffs, testified:

Direct Examination.

I live in Tipton, Missouri, and operate the Skelly Service Station on the corner of Moreau and Moniteau, shown on Exhibit 19. It is right at the corner directly across the street north from the Martin building. I arrived at the scene of the fire about 3:30, about one hour after the fire started.

When I arrived I found broken glass scattered all over my drive, and one of the front doors from the Martin building laying right against the pumps. There were also some window facings, or debris, back of the pumps on the west side. The door was part of the double door right in the middle of the office building shown in Exhibit 15. The door was sort of broken up.

The building was still burning when I arrived. When I got there the second building from the corner, the one next to the office building was burning pretty big. It looked like flames were going up from about the second floor. The second floor itself, that is the partition separating the first and second stories, was still up and had not collapsed when I arrived.

There was one glass broken in one of my pumps, and there were fresh cracks in two posts that supported a canopy on my station.

Cross Examination.

I live about five blocks from the Martin building. Someone called me and told me of the fire, I did not hear the alarm or the explosion. I was asleep.

I did not go into the Martin building when I arrived. I don't think anyone would have gone in at that time. Exhibit 21 shows the way the west wall looked part of the time that there was a fire inside. In the picture some of the brick and stuff is out over the curbline into the street. There was some out there while the fire was still burning The picture is something like what it looked like before daylight. The fire that I saw when I arrived was back of the word "C-O" on Exhibit 20, between that west wall in there between that building and the end building. I stayed around until daylight. (Witness identifies Exhibit 13 as a picture that was taken the next morning looking from the west side southeast into the building.)

Re-Direct Examination.

I observed the windows in the Gabbert's Garage across the street west of the Martin building that morning. The large windows in his showroom were broken and most of the glass was laying on the inside of the building. There was another window out in the shop, and it seemed that the glass had fallen out of that one. I think maybe they boarded the windows up at that time and later put in new glass. Exhibit 10 shows one of the windows in the garage that was out. It shows the large one. There was another one back of this end that was out.

Re-Cross Examination.

I think I remember men cleaning up brick and debris on the sidewalk the next day, trying to get to the meter. Exhibit 22 looks to be a representation of the condition and the men working there the next day. That was before the north wall was pulled down. In Exhibit 22 the brick wall that was between the west building and the next building

is down except for one piece that sticks up. (Exhibit 22 is received in evidence.)

ALFRED F. MARTIN, on behalf of plaintiffs, testified:

I live at Tipton, Missouri, and I was owner of the combination of buildings known as the Martin building. I acquired those buildings over a period of from about 1939 to 1941 or 1942. Before I bought the buildings I was already operating a pants factory at that location as a renter. I started that in the Fall of 1936.

At the time of the fire I was in San Antonio, Texas, and I was notified of the fire by my wife. It took me about fourteen and one-half hours to drive back from San Antonio. I arrived in Tipton about 8:15 Monday evening, and went to the scene immediately. I found the new door to the apartment on the west side of the building was across the street. The door had been on the first floor, but it was the entrance to the second floor apartment. It was across the street at Gabbert's Garage, and another door was in front of the service station in front of the building.

There had never been a fire or explosion on those premises before. While on the premises, I never smelled, or thought I smelled, the odor of gas.

I had lived in Tipton about three years when I started the business there in 1936. The first building I purchased was the easternmost of the three buildings. When I started the business there, the meter shown in Exhibit 15 at the edge of the west building was already in the position shown in the picture. That particular building was not mine at that time, but I purchased it in 1941 or 1942. Mr. Hilgert, who then owned the corner or west building, built a small building for the telephone company in the rear, and it was at that time that the concrete sidewalk was put in flush with the west building. That was when the telephone company moved from the office space on the second floor of the Hilgert building to the new building in the rear. It was 1939 or 1940, thereabouts. The sidewalk was covered from that time up to the time of the explosion.

Prior to that time, according to my recollection, part of the sidewalk was made of brick and part of it was boarded walk. I don't recollect that there was any space between the sidewalk and the building. I imagine Moreau Street is about sixty feet wide.

To my knowledge, I believe that my building was built right on the property line between the lot the building was on and the street. The building has been rebuilt since the fire and the west wall was rebuilt in the same position in which it existed prior to the fire.

I never installed any service line in Moreau Avenue or on the west side of the building. Any service lines that existed there were already in existence when I acquired the property.

We installed a service line in 1937 when I was renting, but it came into the rear from the alley and was installed in the first building on the east, which is shown in Exhibit 15. That service line was extended from the alley to a meter just outside the building at the rear, a foot from the building. The rear of the easternmost building at that time was about 120 feet from the alley. The gas company put in the service line clear up to the meter about one foot from the rear of the building. I did not pay for the service line. The line was for a three horsepower boiler.

Every individual factory machine had an electric motor at the time of the fire. In the corner building or office that borders on Moreau Street we had two steam heaters with electric motors that were thermostatically controlled. One was in the front office and one was in the immediate office in back of that. Those motors would go on or off.

I had never seen the service line that went from the meter on the west side of the building over to the main on Moreau Street, prior to the explosion and fire. Sometime after the fire I learned that part of the pipe had been removed. About three days after the fire I learned that it had been taken by the Gas Company to Fayette. No one at the Gas Company had mentioned anything to me about taking the pipe, or asked me if I wanted to inspect it before they took it.

From the time I acquired these premises up until the time of the fire and explosion the physical condition of the building and the sidewalk and the ground in the immediate area of the meter shown in Exhibit 15 remained the same. With the exception that I stuccoed the outside of the west wall, the physical condition and appearance remained the same for about fifteen years before the explosion. There was no digging in the sidewalk there that I know of prior to the explosion.

At the time of the fire I noticed that all the front plate glass windows in the Chevrolet garage across the street to the west were either totally broken or cracked.

The west building, which had the office in it, was separated by a fourteen inch brick wall on the east from the rest of the factory. The office building itself was enclosed with the exception of a steel fire door.

"Q. Did the gas company or any of its men ever tell you prior to this fire that they had had to dig up some 660 feet of pipe adjacent to your premises to replace it?

Mr. Jackson: Object to that as not material to the case.

Mr. Miller: Too remote, does not tend to prove or disprove any issue in this case.

(Thereupon there was a discussion out of the hearing of the jury concerning the proposed evidence, and particularly concerning the question of whether or not the gas company owned the pipe, and whether or not they had a duty to inspect or notify Mr. Martin in the event that they did not own the pipe, including the following:

The Court: Now, I think with reference to this testimony that you had better put it in by what was actually done, not by conversations with somebody at the gas company and Mr. Martin.

Mr. James: Well, his answer was going to be there was no conversation.

The Court: Then what are we arguing about?

Mr. Randall: That they failed to give him notice when they should have, when they had circumstances that indicated danger to him.

The Court: If it is your pipe and the gas company had no knowledge or reasons to know that there was a leak in your service pipe, then they had no duty whatsoever to inspect that service pipe.

Mr. James: Judge, that is squarely in the face of—

The Court: And it was merely a pipe that probably would leak, there was no duty upon them whatsoever to do anything until they had knowledge that there was any.

Mr. James: I would like to say this, I can't agree with you, that even if this is our pipe then they have to have actual notice of a leak before they do anything about it.

The Court: Or circumstances which would lead them to knowledge of a leak.

Mr. James: Well, that is what we are trying to put in evidence, that they have circumstances that should lead them, as reasonable men handling gas, to knowledge of a leak, and that surely if this pipe under the sidewalk is ours and under our control, it is not any more ours or under our control than house pipes would be, and the Missouri law, in the case of house pipes, is clear that whenever the Gas Service Company has knowledge of any facts that would put it on inquiry and the inquiry—a reasonable inquiry would involve a leak, then they have got a duty, regardless of their control or ownership of the pipe, to either repair the defect or to shut the gas off and give the owner, the customer, a chance to repair.

The Court: I don't disagree with you at all if you are speaking about an actual leak, leaking gas, gas physically escaping from the pipe, I don't disagree with you at all. If they have knowledge of gas actually escaping then they have that duty. But they have

no duty whatsoever under Missouri law to inspect service pipes where there is just a likelihood of a leak. You are talking about the Helmers case, are you?

Mr. James: The Helmers and the Peyton case.

The Court: You have got to consider the facts in the Helmers and Peyton case together with the statement of the Court—

Mr. James: In neither one did they know that there was escaping gas.

The Court: Well, I will give you a chance to convince me. I am not foreclosing you."

There was a crawl space below the floor of the west or office, building. There were four steel or iron registers which were located in the floor near the wall just on the other side of where the meter was located.

Cross Examination.

Before 1933 I lived in Kansas City. I have no knowledge of conditions in Tipton before that time. I went in business in Tipton in 1936 and rented the east building. I didn't buy the west building until 1942. There was no gas in the east building at that time. I, as tenant, did not pay for the service when it was put in that east building. I don't know about what arrangements may have been made between the landlord and gas company.

When I was a tenant in the east building I had to pay my telephone bill at the telephone company in the office on the second floor of the west building. There is no doubt but what there was a meter there at that time. In 1936 part of the sidewalk was wood and part was brick. The part next to the building was wood. The sidewalk was changed in 1939 or 1940. It was when the telephone company moved from the upstairs quarters to their new building. I think it was 1939.

I believe the service pipe was taken out the second or third day after the fire. I saw the men digging there, but I did not know what they were digging for. I did not ask them any questions. I did not complain or protest, because I did not know that I had any reasons to do so.

I bought the first building on the east in 1939. I next bought the middle building and then the west building. With all three buildings I had ninety-four foot of frontage and two hundred feet deep. The two story building was sixty feet deep. When I bought the buildings they all had solid walls between them. I did not know how old they were. The photograph marked Exhibit 15 has a date 1890 at the peak. They were probably about fifty years old when I bought them. They had brick walls. I took out the wall between the east building and the middle building, and put an eighteen inch steel beam north and south and a steel beam east and west with steel columns to support it. The west building was twenty-two feet wide. When I took the wall out it left the upstairs just one room as far as the east building and the middle building were concerned. I had columns supporting the beams on the first floor and the second floor was supporting the roof. The second floor was made of wood laid on 12 inch joists. They were anchored in the brick walls. I later cut archways eight feet wide in the east wall of the middle building after I purchased the middle building. I had three archways on each floor. The wall itself was fifty-five feet long. When I put the stucco on the west side of the building, there was some humidity on the inside of the first floor, but none upstairs. The only way you could put the Johns-Manville plasterboard was to tack strips and then put the plasterboard on the strips, and that is what I did. We drive nails into the brick on the west wall. When I finished that I put stucco on the brick facing of the west wall in 1942.

During all this time either I, or now one of my tenants, was operating 165 to 170 machines in the building, but none of them were ever in the west building. That was an apartment. They were all in the space east of the west building. They weigh from 160 to 170 pounds, including the stand on the machine. In addition we had nine pressing machines that weighed about 400 pounds. These were on the first floor. We also had a machine that supplies air to dry the trousers on the first floor which weighs 350 or 400 pounds. I own about 180 machines all together. At the time of the fire I was renting all the space east of the

west building. The companies to which I rented the space also own some machines of their own, in addition to the one that I rented them. Some machines were on the first floor and some on the second floor on the factory part of the building at the time of the fire. About December, 1954, some machines were moved from downstairs to the upstairs part of the factory. I think after the move there were probably about 100 machines upstairs. Probably 105 people were working upstairs. The tenants had the right to do whatever they wanted to about moving machines, but I talked with them about the proposed move. We put in no additional structural support when the machines were moved upstairs.

After the fire we noticed that the second floor was bulged, or pulled out from the wall at the extreme east part of the factory building about some one-half to three-fourths of an inch. There was no fire damage clear over to the east wall of the factory building. The ceiling was scorched and there was water damage clear over at the extreme east wall of the factory building.

I bought the west building next to Moreau Street in the Spring of 1941 or 1942. At that time there was a grocery store on the first floor of that building. Inside the west building and at the back of the building was a stairway that went to the second floor. There were three or four rooms on the second floor and a doctor's office. There was gas service supplying the second floor when I bought the building in 1942. From the meter the pipe went through the west wall and right straight up to the second floor, then it went north and south and into the back room. In 1942 the pipe went just a little way to the north of where it entered the building. I don't remember whether there was a heater in the bathroom at that time or not. It went to a heater.

I remodeled the upstairs apartment in 1953. Among other things I put a new stairway from the first to the second floor and a new door leading to the stairway on the first floor. It was a solid panel door. There is a hallway when you get to the top of the stairs and then a door leading into the dining room and one into the kitchen. I changed the partitions to make a four room apartment, put

in steel windows, kitchen cabinets and new bathroom fixtures. In the west building there was a hallway leading from the door to the stairs to the apartment. There was a partition between the stairs and my office on the north, with a doorway leading from the hall into my office. There were two rooms in my office space, 12 by 22 and 8 by 22. Then there was a solid partition on the north of my offices separating them from the employees' entrance. There was an outside door right next to the meter on the west of the building leading into the employees' entrance. There was a hallway running clear across the west building and into the factory. The hall was seven or eight feet wide. The north wall at the hall did not go clear to the ceiling. North of that wall was the general office.

After the apartment was remodeled the gas service pipes ran from where it had been from the ceiling of the first floor, ran under the floor and back to the corner where the bathroom was. There it served an automatic hot water heater. The hot water heater was near the brick wall. I also ran a line to the kitchen from the riser right back along the west wall. That is on the inside of the west wall. The kitchen was in the southwest corner of the apartment. The gas reached just inside the partition, within about twelve feet of the south corner of the second floor. This connected to a stove which had a pilot light. I also ran a line to the north to the second room north of the kitchen to an automatic heater with a pilot light.

Starting from the front I had one bedroom which covered the entire width of the building. It was about twelve feet deep. The next room back of that was a living room which went the entire width of the building with the exception of closets. Back, or south, of that was the dining room and back of that was the kitchen and that was in this corner. Next to that in the other corner was the bathroom. That was the way the second floor was at the time of the fire. The door to the apartment entrance was a new stained door. The door leading from the apartment entrance hallway to my office was also a solid door as was the door to the employees' entrance. The doors upstairs were also solid doors. The front doors were double doors and opened in the center. They were also solid doors.

There was a door into my office at the north side of the hallway just inside the employee's entrance leading into my office. Up to the front there was a swinging door.

There was a register in the floor at the northeast corner of the building and one in the northwest corner of the building and on the east wall about halfway from the front office and one along the west wall. The one along the west wall was not more than twelve inches east of where the pipe comes through the wall. It was six feet north of the hallway.

Back of the employees' hallway was a big office and then my two offices and then an office back of that. There was a partition running north and south. A solid partition. It went all the way to the ceiling as did the one on the west side.

The sidewalk on the west side of the building running north and south was a little over seven feet wide. At the edge of the sidewalk there was a curbing, or step-down from the sidewalk to the street, or the divider between the street and sidewalk.

There were some steam pipes downstairs by which my tenants heated the factory, and the steam came from a boiler in the back of the building of the factory part. The steam pipes ran on the ceiling. A two-inch main line fed the pressing machines and then a two-inch line branched off into a one-inch or three-fourths-inch line to the heater. I believe there were seven space heaters all told hanging from the ceiling. Also there was a sprinkler system all through the manufacturing plant.

The door that went up to the apartment was the door that I saw across the street at Gabbert's Garage. I did not see the employees' entrance door after the fire. I saw the front entrance door at the Skelly station.

There was about sixteen to eighteen inches of space between the ground and the floor joists of the office building, and I put the registers in for ventilation purposes. I never smelled any gas in the area of the office building, and my tenants never complained that they had smelled any gas. Carver was the maintenance man for my tenants in the factory building, but when he was there on Sundays he

could not get up the stairway to the apartment. He could go in the office on the first floor or in the manufacturing plant. I said the machines and stands weighed 175 to 200 pounds in my deposition. There was no connection by registers or otherwise between the downstairs office and the upstairs apartment.

Exhibit 23 is the deed I received on November 9, 1942, for the west twenty-two feet, or the Hilgert building. (Exhibit 23 is admitted in evidence.)

Re-Direct Examination.

Exhibit 24 shows the condition of the front part of the office building at the time of the explosion. (Exhibit 24 is admitted in evidence.) During World War II for a period of some four years I had operated a factory on the second floor using more machines and more people than were being used on that floor than at the time of the explosion.

In wintertime the thermostats in the office building were set to maintain the temperature between 75 and 80 degrees over the weekend when the place was closed up.

SAM THIXTON, on behalf of plaintiffs, testified:

Direct Examination.

I live in Tipton, Missouri, and I have in the past been street commissioner of Tipton. I have also been marshal, city collector, constable and water and sewer superintendent of Tipton. I became street commissioner in 1926 and continued as such until 1951. It was part of my job to repair streets when they had been dug up in order to place gas lines.

I recall when a line was laid across Moreau Street from the main near the west edge of the street to the building then known as the Hilgert building. I recall repairing the street afterwards. As far as I can remember this took place in 1932 or 1933, something like that. I think the whole line from the main up to the meter was laid at the same time. That is my best judgment. The telephone

office was on the second floor of the Hilgert building at that time.

Cross-Examination.

I had no occasion to keep any records. The Gas Company laid the line. I do not know who laid the line under the walk. If I ever said I did not know when the line was laid across the street, I do not remember it.

Re-Direct Examination.

The line that I saw the Gas Company lay was the line that came across Moreau. I do not know who laid the line under the sidewalk. It was not part of my duties as street commissioner to maintain the sidewalk.

OTTO CARVER, on behalf of plaintiffs, testified:

Direct Examination.

I live in Syracuse, five miles west of Tipton, and work for the Tipton Manufacturing Company. I have worked for them since 1940 or 1941. In January, 1955, I was a mechanic for that company.

I arrived at the scene about 2:30 on January 31, 1955, after the explosion and fire. The fire was burning and the building was partially destroyed. After I arrived I went into the building on the east side downstairs and on the east side upstairs and turned off all the power. Then I went in the middle room of the downstairs front and shut off the sprinkler system. The middle room is right behind the outside water hydrant shown in Exhibit 15. It is the east side of the first floor of the second building from Moreau Avenue where the valve for the sprinkler system is located. There were pipes going into the other part of the building that were broken and the sprinkler system was doing no good. It had drained all the water off on the fire fighting equipment and they did not have any water.

When I went in the building the ceiling of the first floor of the second building from Moreau Street was still stand-

ing up. Later that ceiling on the second building came down partially and burned some after that.

Cross Examination.

The building was closed down previous to the fire on Friday at 4:30 and all the employees left. I was next in the building on Saturday sometime. I myself, most generally work part of the day on Saturday. I don't remember whether I saw anyone else in there that day or not. The next time I was in the building was Sunday about noon. It was my job to go in there to see if everything was all right. I was there about twenty or thirty minutes on Sunday. That was the last time I was there until after the fire.

They moved the biggest per cent of the machines in December, 1954. They were sewing machines. They moved from 100 to 140 machines. We carried the machines up the stairs. Did not cut hole in the floor. I worked under the direction of Mr. Kolker. It took two days to move the machines. I had four boys carry up each machine. Supports had been put under the stairway two or three years before that.

On Sunday I walked through the building from the upstairs to the downstairs to the boiler room. I do not know whether I smelled the odor of natural gas or not on that day.

The sprinkler and steam pipes were broken after the fire. The pipes running through the east wall of the office were broken. None of the pipes going to the pressing machines were broken. Sprinkler pipes in the office downstairs were broken. I never was in the apartment. I didn't see any gas pipes broken after the fire and I did not look for any.

The biggest machines weighed about 400 pounds and the smallest ones 100 pounds, with an average of from 100 to 150 pounds. More smaller ones than large ones. About 120 people worked on the second floor.

We had a good supply of natural gas in the building as far as I knew. Never any shortage, always good pressure. When I first started operating the boiler, we operated it

with coal. About three years ago we started using gas in the boiler, about 1952. The gas for the boiler came in from the alley on the south. The amount of heat maintained in the building was left up to the people near the heaters. We maintained about eighty pounds of steam on the boiler during the daytime, for eight hours. The gas comes on and off on the heater between seventy-five and eighty pounds pressure. We maintained twenty-five pounds pressure at night.

BAYARD R. BRICK, on behalf of plaintiffs, testified:

Direct Examination.

I live at St. Louis, Missouri, I am a consulting chemical engineer and I own the Bayard R. Brick Company where I maintain a chemical laboratory, drafting room and experimental shop. I have a Bachelor's Degree in chemical engineering and a Master of Science degree, and I did considerable graduate work in chemistry and mathematics and I was on the engineering faculty of Washington University. I have been production manager and purchasing agent for a paint company, chemical engineer for the United States Cartridge Company, which was the largest facility in the world for making small arms ammunition. I handled among other things the powder manufacturing ballistics, explosive manufacturing and handling. I was on the Hazard Control Board which controlled all hazardous materials including explosives, solvents, gases and anything that was toxic or hazardous. I was also on the Safety Appeal Board. After the war, I have been acting as a consulting engineer, specializing largely in fires and explosions.

I was employed by the plaintiffs' attorneys to go to Tipton shortly after January 31, 1955, to investigate an explosion and fire. I arrived in Tipton the evening of February 3rd, it was snowing and slushy. I observed the damage that night and then made further investigation on February 4th and 5th.

The corner building was sixty feet north and south and twenty feet east and west and it had been largely demol-

ished. The walls were down, particularly the west wall, and the bricks were piled up on the sidewalk. The north wall was down, but I understood that it had been pulled down by a cable. The large section of the roof and the back was lying in the street. It was intact and not destroyed by fire. The south wall of the second floor of the building was thrown over on a one-story building to the south of it. That wall was inspected and the window frames were intact, were not injured by heat and were not shattered. The roof that was lying in the street was also intact and not shattered.

There was an eighteen inch crawl space under the first floor about the level of the sidewalk. This flooring had been rolled up. It was disrupted over a large area and rolled up in whole floorboards and tne boards were not shattered. Just some of the tongues were sheared off, but the boards were intact, but pulled off the joists and rolled up.

At the Chevrolet filling station and garage across the street to the west there was a door which was disjointed, but not shattered. There was also an intact door there. Across the street to the north was another filling station and beside it was a large wood door that appeared to be a front door. It was disrupted but not disjointed.

There had been a trench dug through the pile of brick and debris over the sidewalk at a point about thirty feet south of the north wall of the building. It had been filled up again and we had the trench opened. Straight out in the street under the pavement was found an elbow and the gas cock and then the pipe. The trench was dug to the building to the actual masonry wall of the building. There was no gas pipe in it.

We dug the trench down more than three feet and examined the basement wall. The wall of the building itself was all crumbled into the street. We found thirteen inch masonry and rather large stones that were mortared into place. The mortar was in bad shape, soft and chalky. The masonry wall was quite porous. A three-fourths inch hole was found through it, also a two-inch galvanized pipe was found to pierce that foundation and extended out into the street and sidewalk. Piercing the first floor right opposite

the trench was found a ventilating register 18 by 22 inches. The corner building was sixty feet north and south, two stories, and abutted on a one-story building to the south.

In an explosion "fall-out" is that material that is thrown out from the explosion. In this case the brick was lying on the sidewalk, and the roof section and the wall, the second story wall, was thrown on the first floor building. The windows of the east side of the filling station west of the Martin Building were broken and the openings were boarded up with plywood.

On the evening of February 5th I went to Fayette at the Gas Company office and examined the pipe which had been taken from the trench. It is Exhibit 25 and is one and one-fourth-inch pipe. I examined the pipe and found a hole in the elbow and found that the edge of the hole was quite sharp, and comes to a feather edge. The long portion of the pipe is quite badly corroded. The short portion of the pipe has a ground level mark about two-thirds of the way up. The portion that had been under the ground is corroded and a good part of the pipe has corroded away. It had been a galvanized pipe. The long portion of the pipe was the horizontal section which led out to the curb cock. There is a mark, or circle, on the pipe where it went through the concrete. The top pipe is galvanized pipe, coated with zinc. Under the galvanizing it is iron pipe. It is not possible to tell whether the elbow or the long part of the pipe had been galvanized. There is no zinc coating left on it now. The long portion of the pipe is eighty-one and one-half inches long and the short portion is forty-two inches. The shut-off cock was about nine and one-half feet from the masonry wall. That is the shut-off cock that was still in the ground, not the shut-off cock that was just below the meter.

When I was working at the small arms plant, I had considerable experience with corrosion of metal equipment, with anti-corrosion materials, with buried pipes, corroded both by soil corrosion and by the fact that they carried chemicals. In my practice since the war I have had extensive experience with corrosion of buried pipes, and with the protection of buried pipes from soil corrosion and chemicals. Also, I have investigated buried gas pipes after explosions.

In my opinion the hole in the pipe was caused by soil corrosion. Examination of the pipe shows that the metal has slowly disappeared until it completely disappeared over the hole and pitches up at the feathered edge. The rest of the pipe shows tuberculation of corrosion products, also deep pitting. All this is characteristic of soil corrosion. There are characteristic signs of soil corrosion over all portions of the pipe that was below the ground. Based upon the fact that the pipe in question was in the ground at least as early as 1933 and had been in the ground since that time, that the elbow with the hole in it was approximately twenty inches below the surface of the earth, that the ground where the pipe emerged from the earth directly above the hole, the elbow, was not covered by anything for a space of two feet from the west wall of the building, that no later than 1939 the previously existing walk was extended so that it was then a solid concrete walk extending up to and flush with the building, and taking into consideration the facts discovered by my inspection of the pipe and my experience with buried gas pipes and my training, in my opinion this hole was in existence for at least ten years prior to the time it was dug up. Based on the facts that on January 31, 1955, at about 2:15 or 2:30 in the morning, there was a loud noise heard by a person who was approximately a block east of the building that I examined, and that sometime around three minutes later there was another loud noise heard by the same person, who was at that time about a hundred feet northwest from the building that I examined, and that he immediately looked toward the Martin building and found that there were flames visible in the north and northwest corner of that building; that this building had the dimensions that I determined by measurement after the fire, and was locked up at the time these noises were heard; that within an hour after the noise was heard there were found across the street north and in the driveway of a Skelly station a door which was identified as the door which had been in the front of the Martin building, and that there were two doors found westward in the driveway of, or near to, Gabbert's filling station and garage, which likewise were identified as doors which had been on the west side of this Martin building; that the temperatures were cold, some-

thing below freezing at that time; that the building had a crawl space of sixteen or eighteen inches under the first floor and that there was a register twenty-two by eighteen inches between that first floor and the crawl space and adjacent to the wall opposite the place where the meter was located outside; that the floor of the building was bulged or was in the condition in which I found it, rolled back; that the south wall was pushed southward and had fallen on the one-story building to the rear; that within an hour or two after the noise was heard and the fire was observed, the plate glass in Gabbert's Garage westward across the street was observed to be broken out and to be lying inside the garage; that there were two electric motors in the first floor of the building which were automatically controlled by thermostats, and were connected with heaters in the ceiling of that first floor room, and that those thermostats were set on weekends in the wintertime to maintain temperatures of 75-80 degrees; that the doors observed across the street were intact but one of them was disjointed; that two posts of the Skelly filling station across the street north were observed within an hour or two after this noise and fire to have cracks in them that had not existed the day before; that the roof which I saw a few days after the fire was as intact immediately after the fire as it was when I saw it; that at the time of the noise there was a gas meter just outside the west wall of the building as shown in Exhibit 15, and that the pipe, which has been designated Exhibit 25, led from the gas meter down into the ground the distance I have indicated on the pipe by the rust and corrosion, and that it extended from an "L" at that point some two or three feet below the ground horizontally out toward the street, and that the pipe was in the condition in which I observed it there at Fayette; that the pipe was in dirt at the point where the "L" lay that has the hole in it, and the foundation masonry was porous; that a pressure of from three to five pounds was maintained in the pipe at the time of the noises and the fire; and based upon my experience and training it is my opinion that there was an explosion of natural gas followed by a fire.

Natural gas will move through soil. It will tend to move upward, being lighter than air, if the density of the soil

will permit. If the top of the soil is sealed, or the escape of the gas through the top is hindered, then it would tend to travel laterally, and we have found it traveling considerable distances. If the surface of the ground is frozen, the gas will usually travel sideways.

In my opinion the hole in the pipe was not caused by trauma. If caused by trauma, the edges of the hole would be the full thickness of the pipe. The metal would be bent back, and you could bend it out again in its original shape and the edges would meet. That is not possible in this case because the metal is completely gone.

Cross Examination.

My only degree is in chemical engineering. Different metals will corrode at a different rate in the same soils, and the same metal will corrode at different rates in different soils, but the same metal in the same kind of soil will corrode roughly at the same rate. On this particular pipe, there is a different degree of corrosion in the sense that at one point it is corroded through and at other points it is not corroded through. I did not check the soil outside this building except to look at it. Where a pipe has been buried in the soil for sometime the best indication of the corrosiveness of the soil is the experience of the pipe that has been in that particular soil. Soil corrosion is a complex factor and it is difficult to tell what experience will be obtained, from examination of one particular soil. In this particular case, in my opinion, it was irrelevant to determine right at that time the acidity of the soil, the aeration of it, the resistivity, the moisture and all factors having to do with corrosion. The corrosive condition of the pipe was a better indication of the corrosiveness of that particular soil than any chemical investigation of the soil I could have made. I did not take a sample of the soil. All the rest of this pipe is in fair condition in the sense that there are no holes in it and it would carry gas. If gas is escaping into the adjacent soil from a hole of any size you will find chemical evidence of said gas in the soil. I investigated that as well as I could. I believe the soil was loam. I have no records on the nature of the soil. I took none of the soil back to the laboratory. (The Court refuses to

let the witness explain his answer.) I made some tests right at the place where the pipe had been.

As compared with sandy soil, loam is not a porous type of soil. It is a sort of a clay soil. Such soil will stick to something that it is around. With qualifications, it will happen around a pipe. The corrosive scale will many times remain on the pipe. It is possible that the shaking of the pipe from the collapse of some object on the pipe could cause scale to shake off. The pipe itself is an indication of the corrosive condition of the soil.

There is always a flash with an explosion. All of the gas may not be burned by the flash if there is gas that is above the explosive limit. It will burn if oxygen is supplied. In the process of burning or exploding, gas will char things, and when it burns back to the point where the gas enters, it will burn wooden objects around that point. I found no charring of any of the floor on the first floor of the building or around where the meter had been. All I found was a little scorching of the wood. An explosion will follow the line of least resistance. It would go out through a window or door. Whether it would also go out the walls would depend on the force of the explosion. Whether it would take a partition out in another direction from that of the door would depend on the extent of the explosive mixture. It would be a terrific explosion, one that can be heard by everyone in a town of 1,500 at 2:00 in the morning. It would be a rumbling and loud sound.

I don't mean to say that in my opinion the hole existed as it is now for ten years. But it is my opinion that there was a hole there for ten years, with the gas pressure in their system there would be a leak there for ten years if there was a hole for ten years, in my opinion.

If there is a leak in the ground it will progressively dry up the ground around the leak. It does not dry it out precisely, but what happens is the stench material, the mercaptan, is absorbed in the ground; it changes somewhat the appearance of the soil and has a tremendous odor when it is dry. The odor will stay in soil for some time. I do not think that the absorption of the mercaptan makes it any easier for the gas to go through the soil, or less easy,

If enough mercaptan is absorbed it might have the effect of preventing the soil from freezing.

Even though the hole wasn't this big for ten years, it had to be this big for at least some time relatively soon before I saw it. Sixteen thousand four hundred cubic feet of gas per hour would travel though such a hole if it were in the open without any dirt around it. You can't tell how long the hole had been this size, because it got progressively larger. If the hole had been there ten years, then it would be reasonable to say that it was about half that big after five years. A one-half inch hole would permit 4,100 cubic feet of gas to escape per hour if the pipe were open and there was no soil around it. A building sixty by twenty has roughly fifteen or sixteen thousand cubic feet. Even under ground it will flow at a substantial rate with four pounds of pressure. I think it would be reasonable to say that the hole in substantially the size that it is now had been there at least one or two to six months.

Under the circumstances that existed in this building, this gas would be getting in there every week end when the building was closed and probably at times it reached dangerous proportions, but didn't happen to ignite before. The earth having removed the mercaptan, it would be odorless, or at the most have a stale odor. It is always characteristic of a hazardous condition that at one time or another, maybe after a considerable period of time, it gets ignited and blows up. I used an explosive meter around where the pipe had been to determine whether there was a residue of gas in the soil. Where the pipe had been the ground had already been disturbed so there was no actual chance of getting a reading. I didn't expect a reading and I didn't get one. I examined the soil and smelled of it, but I couldn't find the dirt that had been in the hole and besides it was saturated with water and you can't make such tests anyway in that case. Even the ground inside the foundation was exposed and was saturated with water and slush and ice. The center of the building was gutted by fire. The scorching on the flooring was not caused by burning embers falling on it. Parts of the joists underneath the flooring were examined. In a gas explosion the

fire will burn back to the point where the gas is entering if there is enough air to allow such. Whether a carbon deposit is left around the openings depends upon the sufficiency of the oxygen. I don't believe there would be any carbon deposit around the openings, perhaps in the immediate vicinity. I didn't find any carbon deposits of this type near the hole and I didn't expect it. There was no carbon deposit in the earth and you wouldn't expect any there. Outside of the hole, the pipe was pitted in general, but not excessively, according to my deposition. Gas will tend to diffuse equally in a space. In this courtroom it would take about a week for it to diffuse equally. That is assuming that the room is closed off and there is no motion, no people in it.

Re-Direct Examination.

The reasons on which I base my opinion that this was a gas explosion were: the floor was disrupted in the crawl space which is characteristic of a gas explosion. Other things were eliminated. No drums of solvents were found, the type of manufacturing was investigated and there was no possibility of dust, no possibility of gasoline vapor coming from the filling station to the building, and the rear wall was found on top of the roof of the one-story building to the south and it was not fire damaged. The fire had not reached the back of the building. The window casings were intact. The windows had been blown out, the doors were found across the street, one at the filling station and two at the other station, one of them was intact. Because of the slow diffusibility of gas when gas enters an area there are always pockets of gas. The combustibility of gas and air is within a quite narrow range. If you have less than five per cent gas by volume, there is no burning or exploding. If there is more than fourteen per cent gas in the air there is too much gas and not enough oxygen, and it again won't explode. So only from a volume of five to fourteen per cent is gas explosive. The gas forms pockets, some of which have too little gas and some of which have too much gas. The point of ignition has to be reached by a combustible mixture within that very narrow range, then the pocket will explode, that stirs up

the rest of it, and when the rest of it reaches the proper mixture, it explodes. In a gas explosion there is invariably a succession of explosions, usually at least two, the first at the point of ignition. The second explosion is generally louder because it usually involves a greater volume of combustible gas mixture.

Re-Cross amination.

If the person was looking at the area where there was an explosion you could see the flash. If there was no fire, or no flash, there was no explosion. If he heard the explosion and then looked it would be too late because the flash would be gone. Methane gas diffuses rapidly, but it diffuses to a uniform mixture slowly. The maximum disruption of the floor and therefore the maximum explosive force under the crawl space was in the north third of the floor, from the meter towards the front of the building. The floor in the center of the building was eaten up by fire and I couldn't determine anything from that. Sources for ignition were the unit heaters and the thermostats which were on the twelve foot ceiling above the floor and not below the floor. If the motor was the source of ignition, there would have to be a combustible mixture at that point. I don't know of anything under the floor that would ignite it. If it ignited from the motors it would have ignited in the space between the floor and the ceiling. The explosive force goes away from the point of the explosion in all directions. From an explosion of the gas around the heater the force would go out, down and up. That explosion itself would not cause an upward force under the floor, and therefore, there was another explosion, or part of the same explosion, underneath the floor. It could be part of the same flash. All the mixture which was combustible, and you can't determine how much was combustible, would flash at the same time. If it flashed through the registers as it did sometime or another the natural disruption would be upward no matter what had occurred above. It may have taken three minutes after the explosion of the heater twelve feet above the floor until the explosion under the floor. It depends upon the conditions of concentration. That can never be reconstructed exactly. In a natural series of explosions the period of

time between explosions could be up to three minutes. Under the floor might be considerably above the explosive limit and might not be ignited by the original explosion and might be protected from the turbulent blast by the floor itself. The south wall of the building was evidence of a blast on the second floor at the back of the building. The gas was pocketed upstairs in an apartment that was closed off from the downstairs, it would explode downstairs and would go out back, outside, out front. The gas upstairs was in an explosive mixture. That is very characteristic of gas explosions.

Re-Direct Examination.

A floor or door could be a barrier to turbulence caused by one blast and that could explain the possibility of there being blasts as long as two or three minutes apart.

DR. FRED KURATA, on behalf of plaintiffs, testified:

Direct Examination.

I am Professor of Chemical Engineering and Acting Chairman of the Department of Chemical Engineering at the University of Kansas. I have a Bachelor's Degree in chemistry from California Institute of Technology, and I received from the University of Michigan in the Department of Chemical and Metallurgical Engineering my Master's of Science and Engineering Degrees and a Doctor of Philosophy in Engineering. Later I was employed at the University of Michigan as a research associate and worked on classified projects during the war. I was engineer for the Protected Steel Products Company in Pennsylvania, in charge of their laboratory, the control and research laboratory. The company made, or attempted to make, products which were resistant to corrosion. I was later employed as a chemical engineer by the Atlas Powder Company. I am a member of the American Institute of Chemical Engineers, American Institute of Mining and Metallurgical Engineers, American Society of Engineering Education, American Chemical Society, American Association of University Professors, and American

Society of Safety Engineers. At the request of the attorney for plaintiffs I examined plaintiffs' Exhibit 25 last Monday.

Assuming that the pipe had been in the ground, loam or clay soil for approximately 20 years before it was removed, that the physical characteristics and the nature of the ground remained the same for approximately 20 years, with the exception that the ground above where the hole is found was covered with concrete about 15 years before the pipe was removed, and taking into consideration my examination of the pipe, in my opinion the hole was in existence at that elbow for at least five years. The processes of corrosion take place rather slowly and usually the process is faster at the beginning than the end. Since the process had been going on for about twenty years, from the size of the hole, it must have been there for a good many years. The hole was caused by corrosion.

Based upon the facts that on January 31, 1955, early on a Monday morning at about 2:15 or 2:30, there were two noises in the neighborhood of the building, some two or three minutes apart in time; that immediately after the second noise fire emanated from that building; that it was a two-story building with a ceiling over the first floor, with two thermostatically controlled electric motors operating ceiling heaters in that first floor room, and that the thermostats were set so as to maintain temperatures at from 75 to 80 degrees or thereabouts over the week end while that building was closed up; that the building had been closed from 4:30 Friday evening previous to this occurrence until the occurrence took place, with the exception of a period of 20 or 30 minutes when the maintenance man went in and did some checking and went out; that the ground floor of that building covered a crawl space, between the ground floor and the dirt, of 16 to 18 inches; that there was a gas line leading up to the west side of that building to the meter that is shown in Exhibit 15, and that part of the gas line was Exhibit 25, and that the riser part led downward from the gas meter through a sidewalk, a concrete sidewalk, and into the ground a distance of some two to three feet, and that the "L" connection on Exhibit 25 was located about eight

inches from the foundation wall of the building I am talking about, and the foundation wall was stone or masonry and was porous; that there were three or four ventilating registers in the first floor of this building right over the crawl space, and that one of those registers, which had an iron grille in it, was of a dimension of eighteen by twenty-two inches and was located just inside the west wall of the building opposite the meter; that gas was distributed through that gas line at a pressure of approximately four pounds per square inch, and was distributed through that line continuously up to the time of the noises; that the area of this west building was twenty feet by sixty feet and the first floor was about thirteen feet high, and the building was closed up; that four days after the fire was put out there was observed to be an area on the north part of the first floor where the boards were pushed upward; that within an hour or two after the noises were heard three doors of the building were found across the street, west and north; that within an hour or two it was observed that across the street west a distance of approximately sixty feet from the building there was a garage and filling station, the plate glass windows of which were out and were lying inside the garage; and that within an hour or two after the noises were heard it was observed that there were fresh cracks in posts at a filling station across the street north, it is my opinion that the noises and the ensuing fire were caused by a gas explosion.

Cross Examination.

I don't want to create the impression that the hole this size had been there for five years. It probably started as a pinhole. I think it could have been substantially this size for six months, or maybe longer. If the concrete sidewalk above it was continuous and no cracks and there was no open ground in the immediate vicinity, I would say that a lot of this gas would have been going toward the building while there was a leak, but concrete is not exactly impervious; it is porous, it is masonry. Corrosion with the same type of metal will occur more or less uniformly in the same type of soil in the same immediate vicinity. There are no apparent holes in any of this pipe, but it is severely corroded. I cannot tell whether the pipe,

or the elbow, underground had been galvanized. The zinc, if any, would disappear underground, I do not know whether the elbow is the same quality or grade of steel as the pipe itself, but usually these standard pipes and fittings are low carbon steel. I have seen pipes carrying gas or water that are not corroded any worse than this pipe, with the exception of the elbow, but when the pipe gets that bad they are usually replaced. Corrosion is a sort of a scaling process and the scales might be held in position against the pipe by the surrounding ground. There would still be a leak. I have never seen a case that the hole was corroded in a pipe that the pipe was leakproof, but it could be a slow leak. It is possible that it would not cause any trouble. Assuming such circumstances, it is possible for a wall to fall on a pipe and shake the corrosion scale loose. It could not happen as long as the pipe was not displaced in the soil. If the soil surrounds the pipe, there is still no place for the corrosion products to go. The electricity in the ground can cause holes in pipes. That type of corrosion is distinct. Usually the edges of holes are not thin, the hole goes in steeply. In any type of corrosion you cannot say that it is either chemical corrosion or electrolytic corrosion, it is all combined in every case of corrosion. I took into consideration electrolytic action when I answered the hypothetical question. I made ample allowance for the electrolytic effect that you are referring to.

Re-Direct Examination.

Because there was only eight inches of earth between the hole and the porous wall, I believe that proportionately a larger amount of gas would seep towards the building, but the gas would travel underground in all directions from the hole. In any given direction the distance the gas would travel underground would depend upon the covering on the top of the ground, if the surface of the ground is impermeable, then it would travel further.

DAVID C. HARDY, on behalf of plaintiffs, testified:

Direct Examination.

I have lived in Tipton, Missouri, about thirty-five years and remember when Tipton first got natural gas. I was one of the first ones to get it into my home. It must have been 1931 or 1932, I would not be sure which.

I think the service line was laid from the alley, instead of from the street. The Gas Company put it in. I don't think there was anything in writing in regard to my getting gas. It has been a long time ago—can't remember every little detail. The meter was in my yard, two feet from the house. I did not pay for any part of that service line that was laid up to the meter.

Cross Examination.

I don't remember whether I had any writing in regard to it. My residence was about three or four blocks from Moniteau Street.

Re-Direct Examination.

It was about one hundred feet from the alley to my house.

Re-Cross Examination.

I don't remember paying a dollar for the service. I may have done it and I may not. I don't remember paying anything. I don't think I did.

MRS. ROSE HARDY, on behalf of plaintiffs, testified:

Direct Examination.

I am the wife of David Hardy and I have lived in Tipton thirty-five years. I remember when natural gas first came to Tipton. It was in 1931. We got our gas service almost immediately; we were one of the first consumers.

I remember when the trench was dug into our back yard and the line was put in. The Gas Company put it in. They did not charge anything for it. The trench was

dug up to the meter, which was about two feet from the house. It was about one hundred feet from the alley to the meter. I remember that it was awfully rainy and muddy.

Cross Examination.

The Gas Company put the gas in. We didn't sign a paper we just told them we wanted it and we got it. We did not pay anything. I am sure about that.

CLEMONT MCGEE, on behalf of plaintiffs, testified:

Direct Examination.

I live at Fayette, Missouri, and have been District Superintendent since 1932. That includes everything that has to do with the maintenance, construction of gas lines, meter reading, collecting for gas, etc. Tipton first got gas, I think, in 1931. The company that first brought gas into Tipton was not the Gas Service Company, but I also worked for the predecessor company. I was working for the company that initially took gas into Tipton. I was not District Superintendent of the area that included Tipton in 1932. The Tipton area was included in my district in June of 1940 and has been ever since. The Gas Service Company bought out the preceding owner of the Tipton franchise in 1947.

Exhibit 17 is an accurate diagram of the gas main along Moreau Street to the Martin building, and the line running from that main across the street to within two feet of the east sidewalk, and showing the way that this line "T's" off in two directions and then "L's" to the east. The meter to which the north branch of the line extended was just outside the wall of the Martin building, and the service line that extended down from that meter and back under the sidewalk was the pipe that has been marked Exhibit 25. The service line extended directly down into the ground the length of the riser shown in Exhibit 25. The riser was about eight inches out from the building wall.

We have made tests on the two-inch line across the street from time to time and also on the one and one-fourth inch line that runs north and south at the "T" on the east side of Moreau, and also up to the curb, that part of the one and one-fourth inch line east of the "L's." I think the last test of that line up to curb was in February of 1954.

We tested by putting a bar into the ground and using a combustible gas indicator. That was a routine test. We would drive a bar into the ground to the main, in this case it would be about two feet deep, then we would take the bar out and lower a metal tube and then an indicator would tell us whether there was a gas leak at that point. We try to test for leaks when we have time, we don't have any definite period of testing. Time permitting, we try to get over the entire system in Tipton once every year and a half.

When we make a test in the streets, alleys, alleyways, where there is not vegetation, we make bar holes every ten feet, sometimes farther than that. It depends on whether we get indication of gas. We make the bar holes ten feet apart only if we get an indication of gas, otherwise the tests are farther apart. It could be as much as fifty feet. The indicator is very sensitive. The fifty foot test would reveal a leak of any consequence. I doubt that it would reveal a pinhole leak. I don't know of any test that we would make for pinhole leaks that the indicator would not pick up. I am the man who supervises the checking for leaks in Tipton. The periodic tests for leaks are under my supervision. I doubt that we could find pinhole leaks by making our tests ten feet apart. I would say that tests of fifty feet would pick up a leak the size of a match head. The gas was maintained at four pounds pressure.

I arrived at Tipton at 8:00 or 8:30 in the morning on the day of the fire. The Martin building was pretty well destroyed. Some of our trucks were already there. I think three of our men were already there, and they were trying to clear the brick and debris off the meter so that they could turn the gas off. The meter was broken off on the side next to the building, and they turned the gas off on the other side of the meter. The stopcock which

they used to turn off the gas is on Exhibit 25 just below the meter. The meter was right above that. That is the stockcock we used any time we wanted to shut off the gas in order to service a meter or replace it. We used the curbcock to shut off the gas if the customer did not pay its bill.

Mr. Smith wanted us to restore his service, and either the day of the fire or the following day we made a test on his line to see if it was tight. Because there was a fire, his line may have been ruptured within the building. The fact that there had been a gas explosion and a faulty pipe was no indication that there might have been a leak in that area. Mr. Smith did not ask me to test the lines as I recall. Mr. Hecht was standing there when we were making the tests and I asked him to look at the test in order to have a witness that there was no leak there.

We also dug up the pipe that is marked Exhibit 25, I believe the day following the fire. We said nothing to Mr. Martin about digging it up, did not ask him anything about it or advise him that we were doing it. I did not see Mr. Martin that particular day. We wanted to ascertain if there was a leak in the pipe and to preserve it for future reference. When we dug up the pipe I saw the hole in it immediately. It was in the same condition that it is in now. After we dug up the pipe, we did not show it to Mr. Martin or let him examine it, and we did not ask him if he had any objections to our taking the pipe away. I don't know whether it is our practice to take away any pipes that we want to after an explosion without saying anything to anybody. I was ordered to take the pipe by Mr. C. H. Rambo, Assistant Superintendent of the Gas Service Company. He suggested that I dig up the pipe, look at it and preserve it, when I called him about the matter.

The meter that was beside the building and at the top of the riser shown in Exhibit 25 belonged to the Gas Service Company. The Gas Service Company had exclusive control over the meter and did their own testing and checking of the meter, and they would not permit anyone else to test or check the meter. We try to test our meters every seven years to determine whether the meter is fast or slow.

The Commission requires us to test the meters every seven years. We don't make any regular test of the meters except every seven years. There are two purposes in testing a meter, one to avoid any gas leaking into the air so as to create danger, and another to avoid losing gas, losing revenue.

Of my own personal knowledge I have no idea when the two-inch line across Moreau Street shown on Exhibit 17 was installed. I do not know when any of the lines shown in Exhibit 17, running from the main on the west side of Moreau up the very wall of the building were installed.

We tested the service lines going into Smith's Shoe Shop and Veatch Construction Company by taking a pump and gauge and pumping the line up with fifteen pounds of air. The lines tested were from the meter to our curb line. We turned off the stopcock at the edge of the street and pumped air into the lines at the meter connection.

Within the next couple of weeks we tested the four-inch main on the west side of the street and found two small leaks which we repaired. One of them was about fifty feet from the alley. This main had been laid in 1931.

At the scene there was a jet flame burning in the rubble. It was coming from the customer's service line where the meter had been broken on one side. We did not take any soil samples or make any chemical analysis or make any tests. After the fire, it was a sleety, bad day, not so cold, but it was raining and freezing. I don't recall whether it turned into snow.

When we dug up Exhibit 25 it was generally corroded. I saw the corrosion hole. As District Superintendent since 1932 I have laid a lot of gas pipes and taken some of them up. I would say this was a corrosion hole. Corrosion is a slow process.

We had had trouble with corroded and leaking pipe along Moreau Street and adjacent to the factory building in the last few years before the fire, and had laid 625 feet of new four-inch main extending about 515 feet from the "T" connecting the Moreau Street main with the alley main eastward along the alley. We replaced some four-

inch mains along the west side of Moreau north of the alley, I don't recall how many feet. We also replaced thirty-four feet of the two-inch pipe that ran across Moreau Street and to within two feet of the west curb next to the factory building. Exhibit 26 shows that the 625 feet of four-inch main was laid on July 18, 1951. My best recollection is that we laid the thirty-four feet across Moreau in October of 1950.

We had some leaks in the four-inch main, but the line was from six to nine feet deep. We had been pestered repeatedly with having to go to Tipton and repair leaks in that four-inch main. It was cheaper to put in new pipe. It wasn't the number of leaks, it was the time we spent in locating them. Because of leaks it was more expensive to keep repairing them than to retire the old pipe. It was corroded and had some leaks in it. The pipe was eaten up, had some holes in it. That was not true for the entire length of pipe.

With respect to the two-inch line, the worst part was in the middle of the street. I recall though, there was other corrosion the entire length of the part that was replaced. In general it was the same condition as the pipe we took up after the fire, not as bad, but small holes. The same general corrosion action had occurred. We had some leaks in the alley. That is where the pipe was buried so deep it wasn't reclaimed.

I don't recall that we made any other tests in the area when we found the corroded and leaking pipe that we replaced to see if the other pipe was in the same condition. I don't know whether those leaks indicated the likelihood of similar leaks in other pipe of the same age. Pipe we dug up at the fire was about the same condition as the thirty-four feet of two-inch pipe, except the hole was bigger. I do not know whether finding Exhibit 25 in the condition it was in is indicative of other leaks in the same area in pipe of the same kind and age. I don't think that the condition of Exhibit 25 is particularly indicative that other pipe in the area is bad, that is, the likelihood of leaks. Exhibit 25 did not indicate to me the likelihood of other leaks in the same area. When we find pipe such as the thirty-four feet that we replaced we do not check in the area for other leaks.

A. No we don't test it just because we find one leak in a particular spot, we don't run all over town testing for leaks.

Q. No, that isn't the question. The question is where you find a pipe that has been in there since 1931, or shortly thereafter, at least been in there a long time, has become so generally corroded that you can't repair it and instead replace it, don't you consider that a warning to check for other like pipe in the neighborhood to see if there are any other leaks?

Mr. Jackson; If the Court please, object to that because that is misquoting the testimony; it is argumentative, improper cross examination.

The Court: Sustained.

(Offer later was made to show that the answer would have been in the affirmative.)

It is my testimony that when we find for one reason or another that thirty-four feet of service line is so generally corroded that we have to replace it, we do not make bar hole tests or any other tests on either side of that line or on our other lines to see if there are other leaks.

After we dug up Exhibit 25 we made some tests in Moreau Street for other leaks. We made the tests to be sure that there weren't any other leaks. It wasn't a question of whether there was likely to be or not. We made an inspection for leaks in February, 1955, in the vicinity of the fire after the fire because there had been a fire and explosion. It is normal procedure. We did get a little beyond that area, but generally it was confined to that area. It was confined to that area because of the likelihood of another leak there.

Q. (By Mr. James) This hole that you saw when you dug up the pipe in question was the biggest hole you ever saw in gas pipe, wasn't it?

Mr. Miller; I object to that as not tending to prove or disprove anything in this case.

The Court: Sustained.

Mr. James: I would like to make an offer.

The Court: I will give you an opportunity to save your record on that.

(Offer was later made to show answer would have been in the affirmative.)

Q. (By Mr. James) Now, Mr. McGee, no other pipe has had to be replaced in Tipton except in that one area right there adjacent to the factory building since the system went in in 1931, to your knowledge, isn't that correct?

Mr. Miller: Wait a minute. We object to that as not tending to prove or disprove any issue in this case.

The Court: Sustained.

Mr. James: Could I make an offer on that later, too?

The Court: Yes.

(Offer was later made to show that answer would have been in the affirmative.)

As far as I know we never at any time made a test of the approximately seven feet of pipe running from the company meter out to the curb. The fact that the pipe was under concrete was not the only reason we did not test it. I said in my deposition that the reason for not testing it was that it was under concrete from the curb to the building. The two-inch pipe which ran across Moreau Street was black steel pipe. It hasn't been determined whether Exhibit 25 was black or galvanized pipe. It is approximately the same weight pipe.

Cross Examination.

I also said in my deposition that the main reason that we didn't test the service line under the sidewalk was that it belonged to the consumer. The two-inch line across the street was our property. We don't test any customer's line beyond the curbcock and the customer's meter. The Gas Service Company installed and maintained and is responsible for the mains and the main extensions over to the curb line from the street. (Objection that it was a conclusion and wasn't confined to this particular locale overruled.)

We had no records showing when the service line from the curbcock to the building was installed. I also said in my deposition that tests were made along Moreau Street because of the likelihood of the existence of another leak because of the fire and explosion, and that the reason we were checking was because there had been an explosion and fire at that intersection. What I was doing there was to see if any other pipes had been disrupted by the explosion. That is normal safety precaution. (Objection as a conclusion overruled.) In October, 1950, we replaced the thirty-four feet of pipe because of the leaks in it. If it had been corroded, but without leaks we would not have replaced it. We have a lot of pipe that is corroded, but if it is not leaking we don't dig it up. The more than 500 feet of four-inch pipe which we replaced in the alley isn't shown on Exhibit 7, but it runs east of Moreau. One of the principal reasons we abandoned that line was because it was so deep that we had to spend so much time digging. By laying it shallower, we could maintain it better.

I have been with the defendant and its predecessor companies since 1932, but I have been concerned with Tipton only since July, 1940. Since then we have never installed any service lines for a customer from the curb line to the customer's property at our expense. It is installed at the property owner's expense, usually by a plumber. I have seen a printed form of agreement regarding the installation of so-called free-service line, and I think that they are still in the possession of the company. After we install free-service lines we never maintain them after that. I do not know of any service lines beyond the curbcock in that area that has ever had to be replaced or maintained. I have never had that experience. Although I was not manager in 1931, I did go to Tipton and do some work for the company that first started the business there. I solicited some of the free installation arrangements with new customers in Tipton. I did not have occasion to solicit a free customer service with anyone connected with the building in question. The pipe which we took out following the fire has been available to representatives in this action at any time. We had no reason to take it out except to preserve it in the event it might be needed in a lawsuit.

Re-Direct Examination.

The digging up of the pipe with this hole in it of that size had something to do with our testing other pipes in the neighborhood. When a gas company first moves into a town they want to promote as many customers as they can. I don't recall that a gas company ever built the service line clear to the building. The customer would have to build it from that foot up to the meter. I don't know anything about Mr. Hardy's installation, and I don't know anything about the installation of this pipe for the telephone office. In those instances the customers would pay one dollar for the pipe from the curb to the one foot from the building, or if in an alley, from the property line to within one foot of the building.

NAOMI WOOD, on behalf of plaintiffs, testified:

Direct Examination.

I have lived in Tipton since 1948. I have lived in the apartment in the Martin Building from July, 1952, until the time of the fire. My parents live about 12 miles from Tipton and I was at their home at the time of the fire and explosion. I believe I was last in the apartment on the 24th of January. Gas appliances in my apartment were a cook stove, a gas heat stove, and an automatic gas water heater. The lines that served these appliances came from the west side of the building. There were pilot lights on all these appliances, and I had been using them since the time I moved into the apartment. When I left the apartment before the fire I shut off the gas, but the pilot lights were left burning. This is what I had done every time that I had left the apartment for a week end since 1952, and I had had no difficulty of any kind. I had never smelled gas in the apartment.

Cross Examination.

Exhibit 27 is a picture of the building and the apartment. The picture was taken after I installed the air conditioner. The picture was taken in 1954. The picture shows the true condition of the meter and the sidewalk

on the west side of the building. Exhibit 28 is an enlargement of Exhibit 27. (Both are admitted in evidence.) I had a television set in the apartment. It was in the second room from the north and it was installed in January, 1955, a matter of days before the fire. I rented the apartment from Mr. Martin, and I also did some work for him, and I had been working in Jefferson City too. I was not in the apartment at any time after I left there on January 24th. I had the key to the apartment.

Certain parts of plaintiffs' request for admissions, together with defendant's answers thereto were read in evidence, in which defendant admitted that the building in question was damaged by fire on January 31, 1955, but stated it did not have sufficient information to admit or deny that there was an explosion, or, if there was an explosion, that it was a gas explosion or a natural gas explosion, or that it escaped from the hole in Exhibit 25.

Plaintiffs then read certain interrogatories to defendant, and the answers thereto, in which the defendant stated that it removed the pipe in question following the casualty; that the pipe was thirty-seven and one-half feet south of Moniteau, and extended seven feet three inches east to a point about eight inches west of Martin's building, and the removed pipe was ten feet four inches long; that there was a hole in the elbow at the time of removal, which hole had been underground and was oval-shaped and about one and three-fourths inch by one inch in area; that defendant was unable to state what caused the hole; that the pipe was removed on February 2, 1955, at about 10:30 a. m.; that C. L. McGee had custody of the pipe after its removal; that on October 27, 1950, thirty-four feet of two-inch main were replaced one hundred sixty feet north of the alley, and on July 11, 1951, one hundred ten feet of four-inch main, beginning at the alley south of Moreau Street and extending north, were replaced; that the defendant never, prior to January 31, 1955, inspected or

tested for holes or leaks in that portion of the pipe which was removed following the casualty; that the defendant did not at any time before the casualty notify Mr. Martin, or any of the occupants of the Martin Building, that the defendant had replaced the pipes and mains referred to.

C. H. RAMBO, Assistant Superintendent of the defendant's whole system, by deposition, testified:

Our policy is that, when we find leaks in our mains in a given area, we usually make bar hole checks in that area. We would not necessarily make checks of the service lines clear up to the meter from the curbcock. We would not necessarily test all the way up to the meter if it is under pavement. A bar hole test is probably the test we would make. When we made a test or when we make a test under those circumstances of the service line up to the meter, I don't think it would make any difference to us who had purchased the pipe when it was originally put in. When we would test a service line that goes to the customer's meter to be sure that it was not also affected, I think we would get his permission to do so.

If we tested the service line either by the use of bars or by the use of a pressure pump I don't see why it would be necessary to get the permission of the customer.

The Gas Service Company makes regular tests of their mains, particularly in the business district, consisting of the use of a combustible gas indicator at manholes, curb boxes and what-not. It is our policy to make those approximately every thirty days in all business areas. If there were a leak anywhere between these points, since the street is covered with concrete, it would travel to some point where you could pick it up. That one test is all we make in Tipton in the business area. Where the street is sealed over the entire top of the street, gas from a leak would permeate the ground pretty well underneath and at some points you would be able to pick it up.

I told Mr. McGee after the fire, "if there is any that has—from which there has been any evidence of leakage, keep it."

Exhibit 29, being a plat of the city of Tipton and showing Lots 16, 17 and 18 on which the buildings in question were located, is admitted in evidence and shown to the jury. The plat shows the streets of Moniteau and Moreau are both sixty feet wide.

Plaintiff reads from Exhibit 1, being Rules and Regulations governing the distribution of gas in Tipton, Missouri, issued by defendant's predecessor and approved by the Missouri Public Service Commission, being effective on November 1, 1931, and being in force at the time of the installation of the pipes in question. The following is read to the jury from Section 2, Subsection 2 of said Rules and Regulations:

> "The service line from property line to meter location shall be part of the property and shall be installed and maintained at the property owner's expense, but its use as a gas service line will be subject to the inspection and the approval of the company."

Exhibit 30, being Ordinance 221 of the city of Tipton dated May 3, 1948, is received in evidence, and Section 1 is read to the jury as follows:

> "Be it ordained by the governing body of the City of Tipton, Missouri:
>
> That there is hereby granted to The Gas Service Company, a corporation operating a gas distribution system in the City of Tipton, Missouri, herein called the Grantee, its successors, and assigns, the rights, privilege and franchise, for a period of twenty years from the effective date hereof, to construct, maintain and operate in the present and future streets, alleys, bridges and public places in said City, its gas distribution system as now located, together with the right, privilege and franchise to acquire, construct, maintain and operate therein and thereon such additions and extensions thereto as may be

necessary or desirable all for the purpose of supplying natural gas for all purposes to the inhabitants of said City and consumers in the vicinity thereof."

Exhibit 31, Ordinance 108, dated July 21, 1930 (later repealed by Ordinance 221 referred to above) which gave the original franchise to a predecessor company of the defendant, was admitted and Section 4 thereof was read to the jury, as follows:

"Grantee shall furnish free of charge and install for his customers reliable meters or other instruments for the measurement of gas sold and shall keep the same in repair without cost to the customer; all meters or other devices used by the grantee shall at all reasonable times be subject to inspection by the City and the City shall have the right to test said meters and devices at reasonable times. Grantee shall also furnish and install at his own expense proper and suitable and adequate service for each customer from mains to the curb line, if such mains are located in the street, and from mains to the property line, if same be located in alleys, and all such mains and laterals shall be adequate in size and construction."

Plaintiff then read Section 1 of Exhibit 31, as follows:

"That in consideration of the benefits to be derived from the installation and operation of a gas plant and distributing system in the City of Tipton in the State of Missouri, there is hereby granted to Thos. F. Bowdern, his successors and assigns, the right, permission and authority to construct and operate a gas plant and to lay, install, maintain and operate a gas transmission and distribution system within the limits of said City as the same now exists or may be hereafter extended, for a period of twenty years from and after the date of passage of this Ordinance and the ratification thereof by the voters of the City, as required by Statute, and for this purpose there is hereby further granted to said grantee the right, permission and authority during said period

to lay, install, maintain and operate, in, upon, over, across and along all the streets, avenues, alleys, bridges and public places of said City, all mains, services, pipes, conduits and appliances necessary or convenient for transmitting, distributing and supplying gas for heat, power and other purposes for which gas may be used during the term hereof, and for the purpose of transmitting such gas into, through or beyond the immediate limits of said city."

It was agreed that the riser on the service line attached to the meter was buried in the ground twenty-nine inches below the surface of the sidewalk and twenty inches below the surface of the ground. It was also agreed that the pipe extended from that point, which was eight inches from the foundation wall, straight west under the sidewalk and then connected with a curbcock belonging to the Gas Service Company, said curbcock being right at the curb on the west side of the sidewalk. That the curb line was 7.6 feet from the building, and from the curbcock the line extended another two feet west and then joined an "L" connection and extended from that point south a distance of approximately 11.7 feet, where the one and one-fourth-inch pipe joined with a "T" to the two-inch line extending under Moreau Street thirty-four feet to the four-inch main line on the west side of Moreau Street, and that the defendant company owned and had exclusive control of the curbcock.

Then the following proceedings were had in court chambers, out of the presence of the jury:

Mr. Miller: It appears from previous statements made to the Court in chambers that the plaintiffs in each case have two different theories in the case, and I would like to move now on behalf of the defendant that they be required to elect as to what theory they are going to proceed on.

The Court: The Court has indicated to counsel in a prior conference that there is a conflict in the theories on which the plaintiffs are proceeding. One, that the plaintiff proceeds upon the theory that the defendant was the owner of the service pipe from the

stopcock to the meter and therefore had the duty under the law to maintain the pipe in a reasonably safe condition.

Under the law of the State of Missouri, if that service pipe was owned by the plaintiff Martin, then the defendant would have no duty to maintain the pipe in a reasonably safe condition, that that duty would be upon the defendant—the plaintiff, Martin, and if the ownership is in the plaintiff, Mr. Martin, the defendant company would only be liable where it had directly engaged in some test related to the maintenance of the condition of the service pipe in question and had not properly executed that test; or, two, where it had notice of a defect in the service pipe and had not taken the necessary steps to prevent the danger from remaining operative from such defect.

I think the plaintiff ought to elect on which theory they are going to go.

Mr. James: It is the plaintiff's position, if the Court please, that the theories are not conflicting, that if Martin, as stated in paragraph 3 of the complaint—if defendant owned or had under its control the gas line leading to the building and failed to maintain it in a safe condition under the circumstances, the defendant was negligent, and the other theory, which we do not feel conflicts in any way, is that the defendant had knowledge or notice of a defective gas line, a leaking and defective gas line, or knowledge of facts and circumstances that would put a reasonably prudent person, situated as was the defendant company, on inquiry; that a reasonable inquiry would have revealed the defective leaking pipe, and that with that notice the defendant failed either to repair or to warn the consumer, or to shut off the gas until the pipe was repaired, it was thereby negligent and that that negligence was the cause of the damage, and that that theory is supported by the evidence in the case and is not inconsistent with the theory of ownership and control which carries with it the duty to maintain.

In other words, the duty in the one theory arises out of the ownership or control of the pipe. The duty

in the second theory arises out of the notice or knowledge of facts putting them on inquiry, and I think we are entitled to either both of those submissions separately or together as not being in conflict.

The Court: The Court is of the opinion that it is necessary for the Court to determine as a question of law the ownership of this pipe in question, of the service pipe in question.

(Colloquy off the record.)

The Court: It is the Court's ruling that, in light of the evidence introduced by the plaintiffs in this case, there is no evidence to the effect that the defendant was the owner of the service pipe extending from the stopcock to the place where the meter was set.

Mr. Miller: The closest point to the meter was eight inches—

The Court: To where the meter was set adjacent to the Martin property; that under the rules and regulations read into evidence by plaintiff there were in force and effect at the time the pipe in question was laid, it is revealed that the ownership of the service pipe in question was in the owner of the premises in question being serviced by the gas of the predecessor company of the defendant in this case, with the right of inspection on the part of the predecessor company of defendant; that said pipe extended under the sidewalk adjacent to the property of the plaintiff, Martin, and there being no evidence of direct ownership of that pipe in the instant defendant, the presumption is that the pipe was upon property of which, under the law of the State of Missouri the abutting property owner has the fee title subject to public franchises or easements thereover for the maintenance of streets and other facilities, as shown by the evidence.

Absent direct proof of ownership of the pipe by the instant defendant, the Court declares the law to be that under the evidence as established the ownership of the service pipe in question at the time of the occurrence referred to in the evidence was in the

plaintiff, Alfred Martin, and you may proceed accordingly with that being the ruling of the Court.

Now, what else do you have?

Mr. James: In the event it is necessary in order to preserve my record properly, we of course object and except.

The Court: It is not necessary. You have an exception to all rulings made by the Court. It will be understood that you do specifically except to this ruling.

Mr. Miller: The Court is not requiring an election at this time?

The Court: It is not necessary for an election in the light of the ruling that the Court has made.

Mr. Miller: Very well.

Mr. James: If I understand the Court's ruling the Court has eliminated the first theory.

The Court: The ownership of the pipe, yes, placing the ownership in the plaintiff, Martin.

DEFENDANT'S EVIDENCE.

VANSTON H. RYAN, on behalf of defendant, testified:

Direct Examination.

I am director of the Division of Natural Science and Mathematics and professor of chemistry at Rockhurst College in Kansas City, Missouri. I have an A. B. degree, a Master's degree, and a Doctor of Philosophy in chemistry from Kansas City University. I have been at Rockhurst for thirty years as professor of chemistry. One of the main phases of chemistry is the study of gases. Gas will occupy all parts of any shaped container.

It is an impossibility for gas to pocket in a container. If gas were under an eighteen inch floor and there was a register near where the gas entered the underfloor space, it would diffuse in all directions, but it would diffuse through those registers. If a pipe has been buried twenty

inches in the ground and it has a one inch hole in it for about six months and the gas in it is four pounds pressure, I would say that about the first fifty cubic feet of the gas that came through the soil would have the mercaptan, which gives it its odor, absorbed by the soil, then the soil would be saturated with the mercaptan and after that the gas would come out just like it had been put in the pipe.

Gas coming in contact with the soil has a tendency to dehydrate the soil and make it more porous, thus allowing better entrance of the gas. The ground becomes sort of pulverized, and does not pack. The gas would pass more rapidly through that soil then. Under those circumstances, the gas would go through the soil, through the foundation and should eventually form an equilibrium mixture of air and gas underneath the floor and in the building. The sidewalk above would offer an impediment to the gas and would channel the gas and cause it to follow the line of least resistance. Assuming the gas would go through the soil and foundation and rise in the building, a noticeable odor of gas would be present in the building in six months' time.

During that time there should be a substantial accumulation of gas in the building. There should have been a substantial accumulation long before the end of the six months' period with that size hole. During that time there could be formed an explosive mixture in the building. (Objection that the doctor did not have sufficient facts, including whether or not the building was open or closed, etc.) The concentration in the building would change in proportion to the amount of air and the amount of gas coming in underneath. It would be a sort of a continuous proposition. (1) Depending on the gas coming in and also depending on how much you dilute the gas with air. Assuming the container remained the same and the amount of air remained the same, the amount of gas would increase in concentration, would reach an explosive mixture and then eventuafly reach a non-explosive mixture when it went above the explosive range. The lower limit of the explosive range is five per cent gas and ninety-five per cent air and the upper limit is ten per cent gas and ninety

per cent air. If there is gas within a container which is within the explosive range and also gas which is above the explosive range, particularly at the point of ingress and if that which is within the explosive range explodes, that will ignite the gas which is above the explosive range and it will burn. The explosive mixture would undergo the chemical reaction producing carbondioxide and water and the other would burn harmlessly with a yellow flame. That is the pure gas coming in through the source. It would all happen instantaneously.

It could happen that you would have an explosive mixture that would explode and then the diffusing of the other mixture and then a second explosion. But it would be in a very fast sequence that the eye could not distinguish. There could be no such interval as three minutes. From the ignition to the time of the burning of the other gas would be a mere fraction of a second. The explosion is accompanied by light and heat. To anyone observing a gas explosion he would see a flash. There will be the noise of the explosion and the explosion will blow out all the air and create a vacuum and about a second later the air will rush back in and there will be another noise.

The force of an explosion starts out uniformly in all directions. If it meets something sufficient to repel it then it will have to change its direction and follow the line of least resistance. If there is an explosion in a twenty by thirty room which is closed off in a sense that there are solid partitions, and if the ignition is at a point thirteen feet above the floor and there are registers in the floor between the room and the crawl space, it would hit all walls uniformly and they should be blown out, all of them. The force should push the boards of the floor downward and not upward. If there was gas above the explosive limit under the floor, it would burn. If gas was coming to this hole and then under the floor, the explosion should cause the gas to burn back to the source of the entering and would sear the wood flooring, but not really char it. When you burn gas in its pure state, it doesn't have much heat, but there should be lots of carbon in the area. The pipe removed immediately afterwards should have had carbon deposits around the point of ingress.

If the explosion occurred in the front room, that is the north room, whether the walls or the windows would go out first would depend on which were stronger. Usually the windows are weaker. If the front door and the windows went out that would relieve the pressure on the partition behind the room in which it exploded, and in my opinion the explosive force would not continue until it went through the partition, back through doors, and then blow out a door at the southwest corner of the building some sixty feet back, if the explosion occurred in the front of the building on the first floor. When it blew down the first wall, sixty to seventy per cent of the impact would be lost. It would be hard to conceive that the force of the explosion would go through those doors, turn a corner, go up a stairway and blow out the south wall of the building on the second floor. If the explosion was of sufficient magnitude I think that the walls in the room where it exploded would have been blown across the street in preference to going through three walls in the back, and the wall in the northwest corner would have been completely annihilated. With that kind of an explosion the debris can be carried a couple of blocks.

If the explosion was in the front part of the building and it was uniform in all directions, the foundation should have been disturbed clear down to the bottom and front of the building and the first two or three courses of brick above the foundation should not be still in place. If there was an explosion in a crawl space I would expect the point between the foundation and the brick would be pushed out at least, depending upon the intensity of the explosion. I have known of buildings collapsing and rupturing a gas pipe, and the time that it would take for gas from such rupture to accumulate in explosive quantities in the building would depend on the size of the rupture.

Assuming the facts in evidence, in my opinion the first noise heard was not a gas explosion. Gas is a sharper noise, a blasting effect, and if there had been an explosion there would have been flames. In my opinion, the second noise was a gas explosion because of the nature of the sound, the fact that gas was burning and by the type of damage that was done. The fact that after the second

noise, gas, or a gas flame was observed on the second floor at the back near the bathroom is evidence that gas was getting into that vicinity, and it is typical of the after effects of going back to the source of entrance into the container.

From the nature of the damage from the evidence of blow out, in my opinion, gas was released on the second floor, towards the southeast portion and was there ignited by some means. The pilot light at that area could furnish the ignition. The fact that the south wall was blown out of the second floor is significant, since the force of an explosion is greatest near the point of the explosion. It is also significant that the door at the bottom of the stairway down from that bathroom was found sixty feet across the street. The most important point is the south wall with its windows blown out. The wall and windows were carried some distance. The fact that the windows were intact is consistent with a gas explosion.

Cross Examination.

In my opinion, the west wall collapsed, as distinguished from being blown out by an explosion. If the west wall of the building collapsed, it would be less likely that there would be an explosion at a later time, although it would be possible. It would depend on the amount of gas coming in and the amount of gas going out, but no question about it, the gas would be more diluted if the wall was down. I would say that the explosion occurred before the west wall collapsed. In examining the picture it indicates to me that the west wall just collapsed and was not destroyed by an explosion. I am positive that the west wall was present when the explosion took place. I think the explosion loosened the west wall to the extent that it collapsed. I don't think it was due to the original explosive force, possibly secondary, but not primary. In my opinion the explosion occurred while the west wall was intact, the explosive force was driven south going out the south wall, and if the west wall collapsed it was secondary to the blowing out of the south wall. In my opinion the west wall did not collapse first, thereby breaking gas lines and resulting in a later concentration of gas and explosion.

You cannot release gas in the open atmosphere and get a proper mixture for an explosion. It has to be confined in some manner so it becomes just diluted with air. The container does not have to be air tight, and no buildings are completely air tight, and certainly some building that has been in existence for some decades. If we opened a container of gas in one corner of this room under the conditions that we have here, you could smell it at the other end probably in about 15 minutes. You would never have the gas uniform in the entire room except in a room which was air tight and had no openings because with air coming in it is going to be enriched with air, and the gas at the source is going to be richer even than it is here. It would take some time for gas to come in a building and diffuse itself sufficiently so that it would reach an explosive mixture, say near the ceiling of the building where there are electric motors. Under the facts assumed, if there was a break in the pipe caused by a wall or something collapsing on the meter and thereby causing a break in the pipe or breaking scales off of the hole or in any event opening the pipe to the extent of one inch in diameter, I could not express an opinion as to how long it would take to get an explodable mixture in the room, because there are too many variables. I don't think I could get an explodable mixture moving into that building from that hole in three minutes. I think it would be impossible, with those variables. If you have gas coming into a room on the first floor and there are registers between the first and second floor, or an opening to permit gas to pass through, and if the gas on the first floor gets above the explodable limit, and you are releasing as much gas as is passing through the opening to the second floor, the concentration in the first and second floor rooms would never become the same, because the gas in the first floor is always being enriched. There would always be a greater concentration in the room below than in the second floor room. All the gas that goes to the room above would take some air with it, and therefore, the concentration in the room below would get richer and richer assuming the gas is coming in at a constant rate. The gas in the room below could be above the explodable range while at the same time in the second story

room it could be below the explosive range. If the gas in the room above exploded, the gas in the room below would not explode, but it would burn. The gas in the room below could not later reach the explodable range, because it would burn almost instantaneously with the explosion above because of the opening.

The gas passing through soil would dehydrate the soil. It will act as an avenue in the sense that the soil is more porous and the gas can more readily escape. I would not say that it is like a pipe, because this can work in all directions. I have seen instances where gases pass through soil and it makes the soil dusty, pulverized. I do not have an opinion as to whether such soil would seal up a hole in a pipe containing gas at four pounds pressure. As long as there is just one container, it is impossible to have two explosions. As long as there is an entrance from one space to another I would like to refer to that as just one container, and there still could not be two explosions. Although the force of an explosion moves equally in all directions, if a weaker part of the structure goes out, that will make the pressure less on the remaining parts of the structure, and it is possible to have an explosion that will blow out some of the doors and not blow out the walls at all.

One of my considerations, my second consideration, in arriving at the opinion that there was an explosion on the second floor at the rear was the fact that a door from the first floor at the rear end of the building leading up to the apartment was found across the street. If a door on the north part of the building on the first floor was blown across the street, it would be indicative of an explosion on the first floor in the front. It would have the same value as I gave to the other door. It would be practically impossible for an explosion in the back to blow a front door off unless there was some entrance from the second floor to carry the blast down to the first floor.

If the only possible way for the explosive force to get from the second floor was down the stairs and through walls, then it would be impossible for such an explosion to blow off the front door at the north of the building, but I was never told whether there was any opening between

the first and second floors at the front of the second floor apartment. Assuming that the explosion had only the direction to follow mentioned by Mr. Jackson, then if it was impossible for the explosive force to go from the lower front of the building to the second floor back of the building, it would also be impossible for the force to go from the second floor back to the lower front of the building. Mr. Jackson didn't bring in the condition of the front part of the building. If we assumed the facts mentioned in Mr. Jackson's question, that is, could a force go through these walls from the front to the back, turn a corner, go up and knock out the back wall, I say it could not happen. Also, if an explosive force occurred in the upstairs rear of the apartment, it also could not go in the direction mentioned by Mr. Jackson and blow the front door on the first floor across the street. If the explosion occurred on the second floor rear, and the front doors were blown across the street, in my opinion, it was done by something else besides the explosion in the apartment which I have described.

I think it would be possible to have an explosion in the front part of that building on the first floor and for that explosion to roll the floor back over the crawl space. Such a thing could happen. If there was a gas explosion, there would be an immediate flash, which would last a second or two. It is possible that if a person is walking in the opposite direction from the point of an explosion, and that when he looked around, he would not see the flash.

Re-Direct Examination.

The collapse of the inside wall shown in Exhibit 13 could allow intercommunication necessary for the force of an explosion on the second floor to go downward and out the front door on the first floor. That should explain why, if there is any explosion in the southeast corner of the second floor, the front door of the first floor was blown across the street.

DR. CHARLES LEUBBERT, on behalf of defendant, testified:

Direct Examination.

I am a doctor of osteopathy at Tipton, Missouri. I am not a member of the volunteer fire department in Tipton, but I did help them on the night of the fire in the building shown in Exhibit 15. On the night of the fire I was at home one block west of the building. I was awakened and I opened the Venetian blind and saw the fire. I could just see flames in the sky. I could only see the fire over another building, the Ross Building, which was between me and the Martin building. I dressed and went right down to the scene.

When I got there the rural fire truck was coming up the street, and I think there were two ladies standing on the sidewalk. That is the only people I remember seeing at the time. Exhibit 21 is the general appearance of the west wall of the building as I saw it when I arrived. There was more fire inside than shown in the picture. Exhibit 13 is another view of the same part of the building taken from a different angle. (Witness points to section of roof that he saw immediately upon arriving that night.) The north wall of the building was still up when I got there, as shown in Exhibit 13. There was a section of the inside wall, that is, the next wall east, collapsed when I got there. Whether it was exactly like Exhibit 12, I don't remember. With respect to the floor of the second building from Moreau, I remember the edge of the floor sticking out through an opening, and as I remember was cupped down a little. I don't remember just how much. I can't be certain whether I saw what is shown in Exhibit 12. When I arrived the roof over the next building east of the westernmost building was still in place. It later fell down.

The cupping of the second floor in the second building caused the water that we shot up there to run back down. It was running down this floor just beyond the brick wall which was partially collapsed between the west building and the next building to the east. When I was fighting the fire we were on the roof of the one-story building immediately back of what had been the two-story building,

that is, the roof of Veatch's office. I am sure part of the south wall of the apartment building was down then, because we were shooting water through there.

To the best of my knowledge we saw some bathroom fixtures in the area where we were directing our water. That was on the second floor. There was a little jet of flame, or torch, in that area where we were directing our water, which would seem like it was about to go out, but after we would pass over it it would shoot back out, or continue to shoot out. I don't remember when the flame went out.

Cross Examination.

When I arrived there was flame everywhere coming out through this north side. I don't recall anything looking like Exhibit 21, that is, when I hesitated awhile ago, I don't recall the picture in comparison to when I arrived. This picture looks familiar as to the later time when the fire was pretty much under control. I saw the doors from the Martin building that were across the street at Gabbert's garage. The doors lay right by the pumps. I noticed that Gabberts' plate glass window was out. I believe the glass was inside the show room. The part of the Gabbert building where the windows were out was directly across the street from the front part of the west side of the Martin building. The windows that were in the slanting door to the driveway to the Gabbert garage would be roughly opposite to the southwest side of the Martin building. I don't remember whether they were out or not. I would not say that they were. Exhibit 12 shows a scooped-out place in the wall that divided the westernmost building and the second building from the west. I don't remember whether that condition as shown in the picture existed when I arrived, or whether it collapsed further or burned out further after I got there. I remember there was some out, but whether more fell out later I honestly don't remember. I don't remember if the second floor of the second building from the corner was cupped when I got there or not, or if it was cupped later. To the best of my memory the floor was about where it is supposed to be. I don't

know what had awakened me that night, but I woke up knowing that something had happened.

LONNIE BELL, on behalf of defendant, testified:

Direct Examination.

I have lived in Tipton, Missouri, since 1931. I moved to Tipton the first of November in 1939, to put in a restaurant in the Hilgert building.

The building that I rented for the restaurant was the one that was involved in this fire. Hilgert agreed to put gas in for me and fix the building up with a new floor. There was no gas in it when I went to rent it. It was about a month and one-half from the time I talked to him until I got to move in. I had gas to cook with when I moved in.

The meter for that gas service was on the west side of the building right by the side of the building. It is shown in Exhibit 27. Before I rented the building and after I had first seen Mr. Hilgert there was no meter on the side. After I moved in I saw the meter. You could tell it had been freshly put in (objection sustained to question: "Did you see where there had been digging done there, as to underneath the ground?"). I ran the restaurant until sometime in 1941 when I sold it to a man by the name of Smith. I used gas during that time, and the gas was in my name.

Cross Examination.

I am pretty sure that I started the restaurant in November instead of September. The restaurant was on the ground floor. There was already gas in the building when I moved in. I don't know whether gas was used upstairs by the telephone company when I moved in the downstairs part or not; I couldn't swear to that. The telephone company did not receive their gas through my meter. I don't know when the service line from the main up to the meter was put in. When I moved in the meter was there. I don't know nothing about the service pipe. (Exhibit 32, a statement of the witness, is marked for identification.)

I said in this statement I had no idea when the service pipe to the meter was put in, it was in when I first came to Tipton. That is true. I don't know when the service pipe was put in. I don't know whether the service pipe was in or not, but the meter wasn't in when I first came to Tipton. The meter was in when I moved into the place, but it was not in when I went to rent the building.

HARRY KOLKER, by deposition on behalf of defendant, testified:

I live in University City, Missouri, on week-ends, and I live in Tipton during the week. I am superintendent of the firm. I have been superintendent at Tipton since 1947. Otto Carver, the maintenance man, took care of most everything in the building with regard to maintenance. I was in St. Louis at the time of the fire, and had left Tipton after work the previous Friday. I got back in Tipton Monday morning about 9:00 or 9:30. The building was closed on Saturday and Sunday, except that on Saturday machinists might come in or the man that cleans up the place, but on Sunday it would have been closed unless Carver came in to see that everything was in working order. I don't remember whether I had any work for the machinists to do on the Saturday before the fire or not.

I never noticed any foul odor when I would go in the front door where the offices were, not any more than where a building is closed and you walk in there, that is about all. I don't know of any mention being made of such an odor. Once in awhile you can have an odor of cloth if the building has been closed for a day or two. We kept our bolts of cloth downstairs toward the front of the building, toward the office part of the building. We kept a little bit of cleaning fluid for spots, but it is in containers that won't burn. We kept it upstairs.

On days that the factory is not in operation, such as Saturdays and Sundays, I would say that the temperature in there would be 50 to 55 degrees. During operations it would be 70-80 degrees.

We were kind of crowded downstairs and we had some empty space upstairs, and that is why we made the change in December. We put in a new floor upstairs. We had no machines upstairs prior to December, 1954. We moved up 125 to 140 machines. We strengthened the stairs. I never smelled any odor of natural gas in the building. You could go a block or two from there in the alleys and you could smell gas. You don't smell gas in those alleys now. They kept taking out pipes and replacing them. I had smelled it from the time I was down there up until about two years ago (deposition taken April 17, 1956). When we made the new floor upstairs, we left an opening big enough that we could take the machines up by the use of ropes. (Defendant offers in evidence defendant Exhibits 30 and 31 in their entirety, being the Tipton Ordinances.) (Defendant offers in evidence Exhibit 33.)

(Whereupon the defendant rested and, thereafter, the following proceedings were had in court chambers, out of the presence of the jury:)

The Court: Go ahead, Mr. James.

Mr. James: I asked this question, and I am reading from a transcript Miss Finley prepared: "Q. No, that isn't the question. The question is where you find a pipe that has been in there since 1931, or shortly thereafter, at least been in there a long time, has become so generally corroded that you can't repair it and instead replace it, don't you consider that a warning to check for other like pipe in the neighborhood to see if there are any other leaks?"

The Court sustained objection made on the ground that it was misquoting the testimony, argumentative, and improper cross-examination, and I offer to show that if the witness is permitted to answer that question he would say that it would be a warning.

The Court: All right, let the offer be made, and the same objection made to it?

Mr. Jackson: Yes.

The Court: As at the time it was originally offered. Sustained.

Mr. James: I asked this question of Mr. McGee:

"Q. This hole that you saw when you dug up the pipe in question was the biggest hole you ever saw in gas pipe, wasn't it?"

It was objected to on the ground it didn't tend to prove or disprove anything in the case, objection was sustained, and I offer to show that if the witness had been permitted to answer he would have answered in the affirmative, that it was, namely, that the hole in Exhibit 25 was the biggest hole he ever saw in a gas pipe.

The Court: Did he so state in his deposition?

Mr. James: Yes.

Mr. Miller: I think that objection had some other grounds, too. I don't recall just what it was. (Colloquy off the record.)

Mr. James: I was offering that on the theory that the size of the hole had some relation to the time it had been there.

Mr. Miller: That wouldn't prove anything.

Mr. James: And these others he found in this corroded pipe he replaced, indicating that it had been a three or four year progression. In any event, I want to make that offer.

The Court: All right, let the offer be made. Same objection, same ruling.

Mr. James: I asked this question of Mr. McGee:

"Q. Now, Mr. McGee, no other pipe has had to be replaced in Tipton except in that one area right there adjacent to the factory building since the system went in in 1931, to your knowledge, isn't that correct?"

Mr. Miller objected on the ground it didn't tend to prove or disprove any issue in the case. The Court sustained it. I offer to show if the witness were permitted to answer he would have answered in the affirmative, that there was—

The Court: You are making the same objection?

Mr. Miller: Yes.

The Court: That was made at the time it was originally offered. Let it be sustained as to your offer of proof.

Now, do you have anything else?

Mr. James: No, that is all.

Mr. Miller: Do you have any further evidence?

Mr. James: No.

(Whereupon the following proceedings were had in open court, in the presence of the jury:)

The Court: Do you have anything further to submit, Mr. James?

Mr. James: Plaintiffs rest.

(The defendant filed the following motion:)

DEFENDANT'S MOTION FOR DIRECTED VERDICT REQUESTED AT THE CLOSE OF ALL THE EVIDENCE.

Comes now the defendant in the above-entitled case at the close of all the evidence and moves the Court to direct a verdict for the defendant for reasons as follows:

(1) Because the amended complaint fails to state a claim showing plaintiff is entitled to the relief prayed for, or facts sufficient to constitute a cause of action against defendant.

(2) Because upon the pleadings and the evidence including the statements and admissions made by plaintiff's attorneys on pre-trial hearings, defendant is entitled to a directed verdict.

(3) Because there is no evidence that natural gas escaped from the alleged defective service pipe causing the alleged explosion and fire or that natural gas caused the same.

(4) Because under the law of Missouri defendant owned no duty to inspect the alleged service pipe.

(5) Because defendant had no knowledge or notice of the alleged defective service pipe.

(6) Because there is no evidence that defendant caused and permitted natural gas to escape from the alleged service pipe.

(7) Because there is no evidence that defendant negligently failed to inspect and test said service pipe.

(8) Because there is no evidence that the defendant negligently failed to repair or replace the alleged defective service pipe or failed to shut off the supply of gas until said alleged condition could be repaired.

(Filed in the United States District Court and overruled, on September 14, 1955.)

(Plaintiffs submitted the following requested instructions:)

PLAINTIFFS' REQUESTED INSTRUCTIONS.

1.

You are instructed that the defendant, its agents and employees, in handling the sale and distribution of natural gas, owe a duty to exercise a high degree of care which is commensurate with the deadly and dangerous character of its product. That is to say, they owe a duty to exercise the same care that an ordinarily prudent person would exercise under the same or similar circumstances commensurate with the dangers to be reasonably anticipated.

2.

You are instructed that if you find and believe that the damage described in evidence was from an explosion and fire caused by the leakage of combustible gas from a defective service line connection lying between the defendant's main and the defendant's meter, and that the said defect was in that area dedicated to the public use as a street, and used as a sidewalk, and if you further find that the said service line belonged to the defendant, and if you further find that defendant negligently permitted its said

service line to become and remain in a corroded and leaking condition, and negligently failed to inspect said service line and maintain said service line in a reasonably safe condition for the distribution of gas, and if you further find that said negligence, if so, directly caused the said explosion and fire, and the damage therefrom, then your verdict will be for the plaintiffs and against the defendant.

(In the event the Court refuses plaintiffs' requested Instruction No. 2, plaintiffs request the giving of the following instruction:)

3.

You are instructed that if you find and believe that the damage described in evidence was from an explosion and fire caused by the leakage of combustible gas from a defective service line connection lying between the defendant's main and the defendant's meter, and that the said defect was in that area dedicated to the public use as a street, and used as a sidewalk, and if you further find that said defective service line was under the control of defendant, and that the defendant, by and through its agents and employees, knew or in the exercise of that degree of care which is placed upon the defendant in distributing combustible gas, should have known of the said defective pipe in time in the exercise of ordinary care to have prevented said explosion by repairing or causing to be repaired said defect, or warning the customer and shutting off the flow of gas until repairs were made, and that defendant negligently failed to do so, then your verdict must be for the plaintiffs and against the defendant. And in this connection you are instructed that knowledge does not necessarily mean positive information of an unsafe pipe brought directly home to the defendant, but includes knowledge of facts or circumstances that would cause a reasonably prudent person, so situated, to investigate, where a reasonable investigation would disclose the presence of an unsafe pipe.

(In the event that the Court refuses plaintiffs' requested Instructions 2 and 3, plaintiffs request the giving of the following instruction:)

4.

The Court instructs the jury that if you find and believe that the damage described in the evidence was from an explosion and fire caused by the leakage of combustible gas from a defective service line connection lying between the defendant's main and the defendant's meter, and if you further find that the defendant, by and through its agents and employees, knew, or in the exercise of that degree of care which is placed upon the defendant in distributing combustible gas, should have known of the said defective service line in time in the exercise of ordinary care to have prevented said explosion by either repairing or causing to be repaired said defect, or warning the customer and shutting off the flow of gas until repairs were made, and that defendant negligently failed to do so, then your verdict must be for the plaintiffs and against the defendant. And in this connection you are instructed that knowledge does not necessarily mean positive information of an unsafe pipe brought directly home to the defendant, but includes knowledge of facts or circumstances that would cause a reasonably prudent person so situated to investigate, where a reasonable investigation would disclose the presence of an unsafe pipe.

(Counsel for the respective parties made their closing arguments, at the conclusion of which the Court charged the jury as follows:)

The Court: Gentlemen of the jury, able counsel have fairly presented before you all the evidence that they have regarding the issues in this case from their respective standpoints. They have done such an able job that I don't think it is going to be necessary for me to make any comments on the evidence in the case so as to explain to you the law of the case. However, I might have to do so, to refer to some of the facts in the case, so as to better make known to you what the law is so that thereby you may make a practical application of that law to all the facts in the case. But understand this, that if I do relate to some

of the facts in the case I am not expressing any opinion in regard to those facts which is binding upon you. You are not bound by any opinion that you might think that I have. If you thought that I had an opinion with regard to the facts of the case, you should not follow it. I will not express any opinion to you intentionally to influence your verdict in this case because that would be usurping your prerogative.

On the other hand, I state the law to you and you must take the law as I state it to you in this charge. You should not take into consideration any other rule of law that you might have in mind, if I don't state it in this charge, because if you did you would be usurping my function.

So now we have a mutual function to perform, and I am going to state as clearly as I can to you the law in the case. If it appears to you complicated, you are at liberty to call upon me at any time for additional explanations of law.

You must keep in mind one rule of law, that it was the duty of the defendant's agents and employees to exercise a high degree of care commensurate with the deadly and dangerous character of the product, natural gas, handled and distributed by them. That is to say that they owed a duty in relation to the handling of that product to exercise that degree of care which an ordinarily careful and prudent person would use or exercise under the same or similar circumstances commensurate with the dangers to be reasonably anticipated from the handling and distribution of natural gas.

Now the plaintiffs in this case claim that the defendant has failed to exercise that degree of care which the law casts upon it and that the defendant was thereby negligent, and as a result of such negligence the explosion in question occurred and the damage to the Martin building and the personal property contained therein was thereby occasioned.

The specific claim the plaintiffs make is that at the time of the occurrence mentioned in evidence the Martin building and the personal property therein were destroyed as a direct result of a natural gas explosion and fire that

ensued therefrom; that such an explosion and fire were caused by natural gas which had leaked from the service pipe connection introduced in the evidence before you, and that the gas leaking from that particular service pipe diffused through the earth and the foundation of the Martin Building and entered the building on January 31, 1955, until it was present therein in an explosive quantity sufficient to cause an explosion under the circumstances shown in evidence and as claimed by the plaintiffs.

The plaintiffs further claim that natural gas leaked from that service pipe in question for at least a period of five years, under such surrounding facts and circumstances that the defendant knew or by the exercise of that degree of care which the law casts upon the defendant should have known that natural gas was leaking from a defect in that particular service line in such dangerous quantities as to cause the explosion in the building which did occur on January 31, 1955, and that defendant could have repaired the service line or shut off the flow of gas in the service line and notified Mr. Martin to repair and replace the said line and thereby have prevented the explosion which occurred in the building on January 31, 1955.

Notwithstanding such knowledge and notice on the part of the defendant, the plaintiffs claim that the defendant carelessly failed and omitted to repair said service line or to warn Mr. Martin of the defective character of the service line and shut off the gas flowing through the same until Mr. Martin made repairs thereto, and as a direct and proximate result of the negligence of the defendant under those circumstances and claim made on the part of the plaintiffs, the explosion in question occurred and plaintiffs thereby sustained damages.

Now, you are not concerned in this case with the quantum or the amount of damages that these plaintiffs claim from the defendant as a result of any negligence charged by the plaintiffs in this case. In view of the fact that there are three cases here submitted to you at a single time, the only issue submitted for your consideration and determination is whether under the facts and circum-

stances shown in evidence and as submitted to you in this charge the defendant was or was not directly and proximately negligent in causing the explosion in question and the resulting damage occasioned to the Martin building and the personal property therein. That is the only issue that you are to decide in arriving at a verdict in this case.

You need not consider the quantum of the damage that the plaintiffs claim. That will be taken care of by the Court at a later time. You only determine whether or not the defendant was negligent or not under the circumstances shown in the evidence and as submitted to you in this charge, whether or not that negligence was the proximate and direct cause of the explosion in question.

Now, of course, the defendant has denied that under applicable law it was negligent in any manner in causing the explosion in question as claimed by the plaintiffs, denies that it had any knowledge of any defective condition of this particular service pipe in question which would reveal to it knowledge that there was imminent danger or peril of a leakage therefrom, and that it had no notice of any natural gas actually leaking from the service line, and that no natural gas actually leaked from the hole found in the service line after the explosion in question until after the brick wall of the Martin building collapsed and fell on the service pipe and meter attached thereto, and that the explosion and fire occurred, if one did occur in the Martin building, as a direct consequence of some other cause than the leakage of any natural gas from the service pipe in question.

Before the plaintiffs are entitled to recover in this case, you must find and believe from the evidence that if there was an explosion of natural gas in the Martin building in question, that gas came from the leak in the service pipe line exhibited to you in evidence. If the explosion in question or any damage occasioned to the Martin building as a result of explosion or fire was caused by any other source of natural gas, if it was a natural gas explosion, came from any other source than the leaks mentioned in evidence and as exhibited before you in the service pipe in question, then under those facts and circumstances the plaintiffs in this case are not entitled to a verdict at your

hands and you should return a verdict in favor of the defendant in this case on all three of the forms of verdict that will be submitted to you.

Now, in determining the issue of negligence as submitted to you, you are instructed that under the law there was no duty or obligation on the part of the defendant to maintain this particular gas service line that was located between the shut-off cock at the curb of Moreau and the meter set next to the Martin building in a safe condition, and there was no duty on the part of the defendant under the law to make any physical inspection of that line to determine whether any gas was actually leaking from that service line prior to the time of the occurrence in question.

Under the law and the facts of this case, the defendant's only duty in respect to that service line arose, if it ever did arise, after the defendant had some knowledge of the leakage of gas from that particular service line, or notice of a defect in said line which would imminently cause gas to leak therefrom if it was not replaced or repaired, and thereafter to take such reasonable steps as were necessary to prevent the danger arising from the escape of any natural gas from any defect in said line thereafter remaining operative. The steps that the defendant would be required to take under the law, if it had notice of a leak of gas from said service line or from a defect in said service line which would imminently cause gas to escape therefrom was to either repair or cause the defect in the service line to be repaired itself within a reasonable time, or notify Mr. Martin of any such defect or leak of which it had knowledge, and to shut off the gas from flowing into said service line until Mr. Martin made or caused such repairs to be made in the service line as would make it reasonably safe for the transportation of natural gas.

Under the law, as I say to you, the service line in question, that is, from the shut-off cock to the curb line in Moreau Street to the building, belonged to Mr. Martin and it was the duty of Mr. Martin to keep that service line in safe operating condition and free from holes from which natural gas might escape.

However, if the defendant knew or by the exercise of ordinary care could have known that there were defects in said service line which made the service line imminently dangerous and unsafe for the transportation of natural gas, and that the defendant knew or by the exercise of ordinary care could have known that said service line was then and there imminently dangerous and unsafe, and that there was some immediate danger then existing of the escape of natural gas from said line, then defendant had the duty to repair said line or to take some action in respect to said line or notify Mr. Martin to make repairs thereto before the service line was continued to be used for natural gas.

As I use the terms "imminent" and "immediate" danger in this charge throughout, it means conditions which are immediately impending and not such as were remote or contingent. That is, when I use the terms "immediate" and "imminent" in this charge, it does not mean remote, uncertain, contingent or wholly avoidable danger, but means surrounding facts and circumstances from which danger of escaping gas would be immediately impending in a reasonably short period of time and not such that would only be a contingent possibility.

Now, under the law it was not necessary that the defendant have actual knowledge of the location and size of the defect and leak of gas from the service line in question. If defendant had knowledge of facts and circumstances sufficiently pertinent in character to enable a reasonably cautious and prudent person engaged in the business of distributing natural gas to take notice that said service line was leaking gas or was so defective that natural gas would imminently escape from some part of said line if it was immediately continued to be used to transport natural gas, then it may be said that the defendant had knowledge of facts sufficient to cause it to reasonably act in some respect as to the service line in question.

The knowledge of any surrounding facts and circumstances which you find that the defendant should have had notice of should be such as show that the defendant had notice of some defect in the service line from which gas was leaking, or from which gas would with some im-

mediacy leak, or which would imminently leak if the service line was continued to be used for the transportation of natural gas, and not such notice to defendant that gas would merely probably leak from said service line sometime in the distant or remote future.

It is only after notice to defendant of a present leak of gas from the service line in question or of surrounding facts and circumstances that gas would imminently, that is, immediately leak therefrom, that defendant would be required to act in relation to that service line under the facts in this case and the law as I have stated it to you. If there was no leak in the service line or the surrounding facts and circumstances as shown in evidence establish that the defendant did not have knowledge of the condition of said service line, or any condition of said service line which would indicate to it, or a person using ordinary care, that there was imminent danger of a leak from the service line, and that the defendant only had knowledge of facts which establish that there was a remote or possible contingent possibility that gas would escape therefrom, then there was no duty under the law for the defendant to act in any respect as to this particular service line.

So it comes down to this, in this statement of the law that I have given to you, that if the defendant had knowledge or means of knowledge of an actual leak in this service line, then the defendant was required to use ordinary care in respect to that knowledge of any such leak. If the defendant had knowledge of surrounding facts and circumstances which would lead the defendant to know and have notice that there was an imminent danger, that is, a danger within a reasonably short period of time, which an ordinarily prudent and careful person would consider as a reasonable period of time, that if this particular pipe had a defect in it it would leak gas, then the defendant would be required to take some action in respect to the service line. But if the defendant did not have actual knowledge of the leaking of gas from the service line or by the exercise of due care could not have had such knowledge, and there were no facts revealed to the defendant from which the defendant would have

knowledge or notice that there was imminent danger of a leak in the service line, that any conditions existing in the service line liable to leak gas were remote or contingent, then the defendant would not be liable and there was no duty on the part of the defendant in this case to take any action in respect to this particular piece of service line that was introduced in evidence before you.

So if you find and believe from the evidence that the damages to the Martin building and the personal property therein was directly caused by an explosion of natural gas and fire which ensued therefrom, and that such explosion and fire was caused by natural gas that leaked from the elbow of the service pipe connection line between defendant's cut-off cock and defendant's meter mentioned in the evidence, and if you further find that prior to the time of said explosion and fire the defendant, acting by and through its agents and employees, knew or in the exercise of that degree of care which is placed upon the defendant as a distributor of natural gas should have known of the defective condition of said service line and the leakage of natural gas therefrom in time by the exercise of ordinary care on the part of the defendant to have prevented said explosion and fire by either repairing or causing said service line to be repaired, or warning Mr. Martin of leaks in the service line and shutting off the flow of gas therein until repairs were made in this service line by Mr. Martin, and if you find the defendant negligently failed so to do, then if you find those facts to be from the evidence you should return a verdict in this case in favor of all three of the plaintiffs and against the defendant. If you do not find those facts from the evidence then you must return a verdict in favor of the defendant and against the plaintiffs in this case.

The law places on the plaintiffs the burden of establishing by a preponderance or greater weight of all the evidence in the case that the defendant was negligent as charged in this case, that the defendant had notice or knowledge of a defect or leakage of gas from the service line in question prior to the explosion mentioned in the evidence, or that the defendant had knowledge of facts

and circumstances which would establish notice that the service line in question was defective and that there was an imminent danger of gas escaping from the service line. Now, such facts may be proved by circumstantial evidence of those facts or of any fact in this case, but the facts and circumstances considered must be such as directly relate to the ultimate fact to be proved, that is, one fact or circumstance is the knowledge or notice on the part of the defendant that said service line was imminently dangerous and unsafe for the transportation of natural gas, and that gas was escaping from the service line for a reasonable period of time prior to the explosion in question. The facts and circumstances which you consider must directly relate to that ultimate fact before you can find it to exist as a fact in this case from such circumstantial evidence.

If plaintiffs have sustained the burden of proof cast upon them under the law and established the negligence of the defendant and each of the facts that I have stated to you that the plaintiffs must prove in this case before they are entitled to recover, by a preponderance of the credible evidence, then the plaintiffs are entitled to a verdict at your hands in this case.

If the plaintiffs have failed to establish such facts or the evidence with reference thereto is evenly balanced, then your verdict must be in favor of the defendant in this case.

You cannot return a verdict for either party in this case upon speculation and conjecture. If you enter into the realm of speculation and conjecture as to what happened at the time in question, or you enter into the realm of speculation and conjecture in returning a verdict in favor of the plaintiffs in this case, then that would be contrary to the law. If you must resort to speculation and conjecture as to what happened at the time of the occurrence in question then you must return a verdict in favor of the defendant in this case.

If you find and believe from the evidence, as I have heretofore stated, that the explosion in question and fire that ensued were not caused by escaping gas from this particular elbow, demonstrated before you in evidence,

then your verdict must be in favor of the defendant in this case and against the plaintiffs. If that explosion was caused by any other means or by natural gas from any other source than that particular service pipe, then the plaintiffs are not entitled to recover in this case.

In considering the issue as to whether the defendant had knowledge of facts and circumstances which would lead a reasonably prudent person to know that the service pipe in question was imminently dangerous and defective for the transportation of natural gas, you will limit your consideration of the evidence in respect to the removal and replacement of the 34 feet of 2-inch main that was running across Moreau Street from the 4-inch main on the east side of Moreau that was removed on October 27, 1950. You are limited to that because that is the only evidence before you as to any facts or circumstances which would lead the defendant to have knowledge or means of knowledge of any condition of the particular service line with which we are concerned.

I am not going to review all of the testimony that is in the record with reference to the replacement of that line. You will recall the testimony in respect thereto. But if you desire the Court to review it for you later on, the Court will be glad to do so. I only mention and draw it to your attention that the evidence is that that main was corroded and leaking, that it had to be removed, that there was evidence that the service line in question was of the same material as the particular 2-inch line that was removed by the defendant.

Now, it is the plaintiffs' contention that at that time there was a leak in this particular service line, and that defendant knew or by the exercise of ordinary care could have known of such leak in said service line, or that the defendant knew or by the exercise of ordinary care should have known that this particular service line was then and there so defective that there was an imminent and immediate danger of that service line permitting gas to escape therefrom, and it was continued to be used for the transportation of natural gas.

It is the defendant's contention, broadly stated, that the 34 feet of main was removed by it and that the con-

ditions of that particular main were not indicative to it of any defect in this particular service line with which we are concerned, and that the condition of the 34 feet of line when it was removed was not indicative or noticeable to a person of reasonable prudence that another piece of its particular main or lines or any lines to which it had any duty was then imminently dangerous and unsafe for the transportation of natural gas. That, broadly stated, is the defendant's contention in regard to that situation.

Now, the conditions that you must find to exist, in considering whether the defendant had knowledge of any facts or circumstances which would indicate to it by notice that this particular service line was in such condition that it would imminently permit gas to leak therefrom, relate to that particular time. If you find and believe from the evidence that there was no leak existing in this particular service line at that time on October 27, 1950, or that the condition of the 34 feet of line that was removed by the defendant from Moreau Street was not notice to the defendant of any condition then and there existing in this particular service line, then you should return a verdict in favor of the defendant in this case.

You are the sole judges of the credibility of the witnesses and of the weight and value to be given to their testimony. In determining the credit you will give to a witness, the weight and value you will attach to a witness' testimony, take into consideration his conduct and appearance upon the stand, his interest, if any, in the result of the trial, the motive actuating him in testifying, his relation to or feeling for or against either of the parties to this case, the opportunity he had to observe and be informed regarding the facts to which he gave testimony, his inclination to speak truthfully or otherwise regarding those matters. Taking all these matters into account, together with all the other facts and circumstances shown in evidence, it is your province to give the testimony of each witness such weight and value as you deem proper.

If, upon a consideration of all of the evidence in the case, you believe that any witness has wilfully sworn

falsely as to any material fact in the case, you may reject or treat as untrue the whole or any part of such witness' testimony.

There are three cases submitted for your consideration at this particular time, all arising out of the one set of facts, so you will have to return three verdicts in these cases. They are separate cases but they have been consolidated by the Court for this particular trial. So the forms of verdict in each case read, "We, the jury in the above-entitled cause, find the issues in favor of the plaintiff and against the defendant." Then there is a blank line for the foreman to sign.

There is another form that reads, "We, the jury in the above-entitled cause, find the issues in favor of the defendant and against the plaintiff," in that particular cause. The title of the cause is stated on these particular forms. Your foreman will sign that.

Now, in the federal court all 12 jurors must agree upon any verdict that is returned to the Court. Nine or more cannot return a verdict in this court, all 12 jurors must agree upon a verdict in each of these cases.

It is nearly 12:00 o'clock, gentlemen. You have been very patient and cooperative with the Court, and I am not going to impose upon you to go out during this particular time, so we will take a recess at this time till 2:00 o'clock. Then you can come back and consider your verdict in this case.

Now, you have heard all of the evidence, the arguments of counsel, you have received the instructions of the Court with reference to the law in the case. As I said to you, if there is anything in this charge that is not clear to you, or if you desire the Court to refresh your recollection with reference to any of the evidence in the case, you are at liberty to call upon the Court to do so. If the Court can aid you in anywise during your deliberations you are at liberty to return into court and state how the Court can aid you in reaching a verdict in this case.

It is pretty expensive for these people to present this case to you and it is their hope, as well as it is the Court's, that you will reach a verdict in each one of these cases.

Let each juror fairly and impartially consider the facts as they have been submitted to you. Do not take into consideration any matters that have not been testified to here in court. Consider those facts, consider the law as I have stated it to you, render your verdict accordingly and you will do justice between these parties. During this recess do not discuss the facts of this case among yourselves or permit anyone to discuss the facts with you or in your presence or hearing, and keep your minds open until you have an opportunity to discuss with the other jurors all of the facts and the law as I have stated it to you.

(Thereupon, out of the hearing of the jury, the plaintiffs excepted to the charge as follows:)

The Court: Do you have some exceptions, Mr. James?

Mr. James: Yes, sir. Plaintiffs except to the refusal of the Court to give plaintiffs' requested instructions 2, 3 and 4, on the ground that those instructions are correct statements of the law applicable to this case and the evidence adduced.

The plaintiffs object and except to that part of the Court's charge in which the Court charged the jury that there was no duty to maintain or inspect this particular pipe, and that the only duty on the part of the defendant arose after some knowledge of a leak in said line or some defect in said line causing the leak, for the reason that there was evidence from which a jury could find that there was a duty because of the fact that the defendant owned the pipe, and there was evidence from which the jury could find there was a duty because of the fact that the defendant exercised control or had control of the pipe in question, and the instruction erroneously eliminates from the jury's consideration the finding of a duty based upon ownership or control, and for the further reason that that part of the charge confines the jury to a finding on the part of the defendant of knowledge of an actual leak, before the duty arises.

The Court: Do you have in mind any particular portion of the charge? I intended to charge the jury with reference to notice of a leak or conditions of a defect which would produce a leak. Did I—

Mr. James: You did later go more into detail as to knowledge of the leak, but this particular part—in that particular part I am referring to now, I think the charge would give the jury the idea that plaintiffs had to prove defendant had actual knowledge of a leak. I will get to those others later.

Plaintiffs also object and except to that part of the Court's charge to the jury to the effect that the pipe in question belonged to Martin for the reason that there is evidence from which the jury could find the pipe did not belong to Martin.

Plaintiffs object to that part of the Court's charge to the effect that the pipe belonged to Martin and that Martin therefore had a duty to keep it free of holes and safe for the transportation of gas, for the reason that said charge was erroneous because there was evidence that the pipe did not belong to Martin, and for the further reason that the charge imposed the absolute duty on Martin to maintain the pipe in a safe condition and free of holes, without regard to control, without regard to ownership, without regard to negligence of the defendant, and without regard to other facts and circumstances in the evidence, and without regard for any negligence on the part of Martin.

The plaintiffs object to that part of the Court's charge in which the Court charged the jury that if the defendant knew the line was imminently or immediately dangerous and unsafe, there was a duty to notify and to turn off or repair, for the reason that that part of the charge erroneously required an immediate danger of explosion, and for the further reason that it had erroneously eliminated from the jury's consideration facts from which the jury could find the pipe was in such condition that it was likely to leak, and that it was in a dangerous and defective condition.

The plaintiffs object to that part of the Court's charge in which the Court charged the jury that imminent or immediate danger means danger immediately impending and does not mean a remote, contingent or avoidable danger, for the reason that in so defining imminent or immediate danger, the Court erroneously requires the

jury to find that the danger was immediately impending and that the danger was not avoidable when under the law the defendant had a duty if the defendant knew or should have known of a dangerous or defective condition that was likely to produce an explosion, and that defendant could have avoided the explosion after it knew or should have known of that condition, and because there was evidence supporting a finding by the jury under a charge correctly stating that duty.

The plaintiffs object to that part of the Court's charge which told the jury that knowledge of facts and circumstances means knowledge that gas was leaking, for the reason that it denies the plaintiffs the right to have the jury find negligence because of the knowledge of facts and circumstances putting defendant on inquiry which would divulge that the pipe was dangerous and defective and likely to leak.

The plaintiffs object to that part of the Court's charge in which the Court said that knowledge did not mean the knowledge of the possibility or probability of a leak, and that a finding of the knowledge of a possibility or probability of a leak would not be sufficient, a sufficient finding upon which to base a verdict against the defendant, for the reason that that part of the charge erroneously deprived the plaintiffs of the right to have the jury find negligence because the defendant knew of facts and circumstances which would put it on inquiry and where the inquiry would reveal the probability of a leak, and deprived the plaintiffs of the right to have the jury find that the defendant had knowledge of facts indicating to any reasonable person handling gas the probability of a leak.

The plaintiffs object to that part of the charge in which the Court told the jury that in determining whether the defendant had knowledge of facts, the jury should limit its consideration to the evidence of the removal of the 34 feet of pipe, for the reason that such part of the charge erroneously eliminated from the jury's consideration evidence which under the law the plaintiff had a right to have considered by the jury, namely, the evidence that 625 feet of main connected with the 34 feet and adjacent

to the building along Moreau Street and adjacent to the building in the alley, which 625 feet according to the plaintiffs' evidence had been in the ground only one or two years more than the 34 feet, the 625 feet having been put in in 1931 and the 34 feet and the pipe under the sidewalk in question having been put in 21 or 22 years ago, and the consideration by the jury of the evidence that that pipe was badly corroded and old and unsafe and had to be replaced.

The Court: The reason the Court eliminated that from specific mention in the charge is that there is no evidence that the quality or weight of the 4-inch main was the same as that of the 2-inch main to which the Court referred, nor is there any evidence before the Court to show that it is comparable pipe to that of the 34 feet which was removed or to the particular service connection in question.

Mr. James: The last mentioned instruction also eliminated from the consideration of the jury this further evidence upon which plaintiffs were entitled to consideration by the jury, in determining knowledge, that was the evidence that the defendant made a test, a bar hole test, in February of 1954 with an instrument that would pick up a leak anywhere within a distance through the earth of 50 feet, and the evidence that the defendant company made tests in this business district up to all their curb cocks every 30 days with a bar hole and a gas indicator, which would indicate gas, from which evidence, together with the evidence that the hole was in existence for at least five years, was evidence from which the jury could find that the plaintiff made tests and from those tests, at a time when the hole was in existence, knew or should have known of circumstances putting them on inquiry, namely, that there was gas in the earth, and caused them to inquire and investigate, which inquiry and investigation would have divulged the leak in question.

Those are all the exceptions to the charge.

(Thereupon, the jury retired to deliberate. Thereafter, on the same day, the jury returned into open court and the following proceedings were had and entered of record:)

The Foreman: Would you please repeat for the benefit of the jury that part of your instructions that deals with the responsibilities of the Gas Company as far as testing the part of the line that went from the curb cock to the meter and also their responsibilities to notify Mr. Martin.

Is that right, gentlemen?

The Court: Gentlemen, suppose you take your seats in the jury box.

Of course I told you gentlemen that in its operation, maintenance and distribution of gas, the defendant is required to use ordinary care, and that is such care as a reasonably careful and prudent person engaged in a similar line of business would use in the handling and distribution of natural gas.

Now, under the law there was no duty or obligation on the part of the defendant to maintain the gas service line located between the shut-off cock and the curb on Moreau Street leading up to the meter next to the building, in a safe condition or to make any physical inspection of that line to determine whether any gas was actually leaking from the line prior to the time of the occurrence in question.

Under the law and the facts of this case, that particular service line belonged to Mr. Martin, the owner of the building in question, and it was the duty of Mr. Martin to keep that service line in safe operating condition and free from holes from which natural gas might escape. However, under the law and the facts of this case, the defendant's only duty to act in respect to that service line would arise, if it did arise, after the defendant had some notice of the leakage of gas from the service line, or knowledge of surrounding facts and circumstances which would lead the defendant, or a careful and prudent person engaged in the same line of business, to know that a defect existed in that line which would imminently cause gas to leak therefrom. That is to say that if the defend-

ant had knowledge of surrounding facts and circumstances which would lead the defendant to know or by the exercise of ordinary care it should have known that there were any defects in the line which would imminently cause gas to leak from that line, then it was the duty of the defendant to either itself make repairs to the line, if it continued to permit gas to flow through the line with such knowledge, or to warn Mr. Martin of the condition of that line and require Mr. Martin to make the repairs thereto and shut off the gas flowing through the line until he did make such repairs.

Now, as I said to you, the imminent and immediate danger of gas escaping from the line from a defect which the defendant knew or by the exercise of ordinary care should have known does not mean remote, uncertain or contingent danger at any time in the future. It means surrounding facts and circumstances or danger of gas escaping from the service line which would lead a reasonably prudent person to know that by reason of such defects gas within some reasonably near period of time would escape. In other words, that there was a defect in the line which might temporarily permit gas to flow through it, but from the exercise of ordinary care the defendant knew or should have known that that defect was such that, in some reasonably near period of time, it would permit gas to escape from the line, and if it had that kind of knowledge, then the defendant should have undertaken to repair the line or to notify Mr. Martin to repair the line and shut off the gas.

But if the condition or surrounding facts and circumstances were such that a reasonably prudent person would have notice or knowledge concerning the line, that perhaps sometime in the remote or uncertain or contingent future there might be a hole in the line, that would not place any obligation upon the defendant to do anything in respect to this line, that is, presently considering the facts and circumstances of which defendant had knowledge.

Now that is with reference to the defendant's duty in respect to the line, because of some defect in the line where gas was not actually escaping from that defect,

but by reason of the defect there was imminent danger, immediate danger of gas escaping from the line. If the Gas Company had notice of those facts, then it was its duty to act. If it did not have notice which would cause it to believe that there would be an immediate and imminent or near immediate failure of the line, of gas escaping from it, then the defendant had no duty to act in respect to the line.

There is other testimony in the case with reference to this hole existing in this line for some period of time and gas escaping therefrom, that the defendant made certain tests along its line in Moreau Street. If the defendant knew or by the exercise of that degree of care which the law places upon it could have known that there was gas escaping from this line, that is, actually escaping from the line, then of course the defendant had the same duty to do something in respect to that escaping gas and to either repair the line itself or have Mr. Martin repair the line and shut off the gas until he did so.

So that, as to actual escaping gas, if the defendant knew or should have known thereof, then it was required under the law to act.

With reference to a defect in the line, if it had knowledge of such facts as would put a reasonably prudent person on notice of a defect that would cause imminent danger of gas escaping from the line, it had the duty to act. If it did not have knowledge of any actual escaping gas from the line and if it knew of no surrounding facts and circumstances leading it to notice of any defect in the line which would imminently cause danger of gas exploding from the line, it had no duty to do anything with reference to the line.

Does that answer your question? Is there any juror who desires to ask any question?

If that satisfies the jury then, Mr. Foreman, you may return to your jury room and further consider your verdict in this case.

(Whereupon, the jury retired to further consider its verdict, and the following proceedings were had in the absence of the jury:)

The Court: Make such record as you desire, Mr. James.

Mr. James: Plaintiffs wish to object to those portions of the repeated charge which were the same in substance as similar portions made in the original charge, and each of them, for the same reasons given.

The Court: The same exceptions stated by you at the close of the charge as a whole?

Mr. James: Yes, sir. And Plaintiffs further object to the part of the Court's charge before the end, where the Court mentioned notice of gas exploding from the line.

The Court: If I said explodi g escaping from the line was what was meant.

Mr. Miller: I don't think you said exploding.

Mr. James: I didn't catch it either. Mr. McCanse did.

Mr. McCanse: I thought Your Honor said that.

The Court: If I did it was a slip of the tongue and they certainly know I was talking about gas escaping.

Mr. James: Plaintiffs further object to the part of the charge that emphasized and repeated that the defendant had to have knowledge of a leak or notice of the facts indicating an immediate leak or danger, for the reason that it unduly restricts the jury and prevents the jury from finding that the defendant had knowledge of facts and circumstances that put them on inquiry and where an inquiry would reveal a dangerous condition although it might not reveal that gas was immediately leaking from the pipe.

The Court: I tried to use "imminently" as much as possible.

Mr. James: You used "immediately" two or three times, and "immediately" is a pretty short time.

The Court: In a different sense.

Thereafter, verdicts were returned for the defendant, and notice of appeal was filed as follows:

After the verdicts were returned, the Court made the following comments:

"* * * I say to you if I had been passing upon the facts in the case I would have returned the same kind of verdict under the facts here, because definitely there was no notice of any actual gas escaping made known to the defendant in this case. Nobody ever smelled any gas around this place and it seems with that kind of a break in the line there would have been certain disruptions sufficient so that somebody would have smelled gas there if there had been any gas escaping for a considerable period of time, and I don't think that defendant had any notice of a defect in the line. Because one piece of pipe lying in the ground might be corroded so it has to be taken out does not necessarily indicate that all pipe in the same area is defective or requires the taking up of every other pipe in the neighborhood."

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Notice is hereby given that Alfred F. Martin, plaintiff in the above action, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the final judgment entered in the above action in favor of defendant The Gas Service Company and against plaintiff on September 14, 1956.

(Filed in the United States District Court October 13, 1956. Similar notices were filed in the Wood and Biltwell cases.)

DESIGNATION OF RECORD ON APPEAL.

Comes now appellant, Alfred F. Martin, and designates all the original papers, including a complete transcript of the evidence and all exhibits, as the record on appeal.

(Filed in the United States District Court October 16, 1956. Similar designations were filed in the Wood and Biltwell cases.)

RELEVANT DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT.

In the Wood case:

Mch. 22, 1955	Complaint filed
Apr. 12, 1955	Answer filed
Jan. 30, 1956	Pre-Trial Order filed (Consolidating cases Nos. 9684, 9689 and 10055)
Mch. 2, 1956	Pre-Trial Order filed
Apr. 24, 1956	Amended Complaint filed
May 4, 1956	Defendant's Answer to First Amended Complaint filed
Sep. 10, 1956	Case called; Jury empanelled; Trial
Sep. 14, 1956	Trial resumed; Verdict—Judgment for defendant
Oct. 13, 1956	Notice of Appeal filed by plaintiff
Oct. 15, 1956	Cost Bond on appeal filed
Oct. 16, 1956	Designation of Contents of Record on Appeal filed
Nov. 13, 1956	Order extending time to Dec. 14, 1956, for filing record on appeal and docketing the appeal filed
Dec. 12, 1956	Transcript of Testimony in two volumes and exhibits filed

In the Martin case:

Mch. 28, 1955	Petition for Removal from Circuit Court of Jackson County filed
Mch. 29, 1955	Answer filed
Jan. 30, 1956	Pre-Trial Order filed (Consolidating cases Nos. 9684, 9689 and 10055)

(Remaining docket entries are the same as those in the Wood case)

In the Biltwell case:

Oct. 27, 1955	Petition for Removal from Circuit Court of Jackson County filed
Nov. 23, 1955	Answer filed
Jan. 30, 1956	Pre-Trial Order filed (Consolidating cases Nos. 9684, 9689 and 10055)

(Remaining docket entries are the same as those in the Wood Case)

VOL. II

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RECORD

VOL. II — [illegible]

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

FILED
SEP 24 1957
[illegible] Clerk

Nos. 15,[illegible], 15,[illegible] and No. 15,[illegible]

CIVIL.

NAOMI WOOD,

Appellant,

vs.

THE GAS SERVICE COMPANY,

Appellee.

No. 15,[illegible].

ALFRED F. MARTIN,

Appellant,

vs.

THE GAS SERVICE COMPANY,

Appellee.

No. 15,[illegible].

BELTWELL COMPANY, INC., TIPTON MANUFACTURING CO., GLENBROOK TROPHIES COMPANY, AND EMBASSY MANUFACTURING COMPANY,

Appellants,

vs.

THE GAS SERVICE COMPANY,

Appellee.

No. 15,[illegible].

APPEALED FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIV[illegible]

HONORABLE ALBERT A. RIDGE, JUDGE.

FILED
JAN 21 [illegible]
E. E. KOCH

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

Nos. 15,698, 15,699 and No. 15,700.

CIVIL.

NAOMI WOOD, *Appellant,* vs. THE GAS SERVICE COMPANY, *Appellee.*	}	No. 15,698.
ALFRED F. MARTIN, *Appellant,* vs. THE GAS SERVICE COMPANY, *Appellee.*	}	No. 15,699.
BILTWELL COMPANY, INC., TIPTON MANUFACTURING CO., GLENRIDGE TROUSERS COMPANY, AND EMBASSY MANUFACTURING COMPANY, *Appellants,* vs. THE GAS SERVICE COMPANY, *Appellee.*	}	No. 15,700.

APPEALED FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION.

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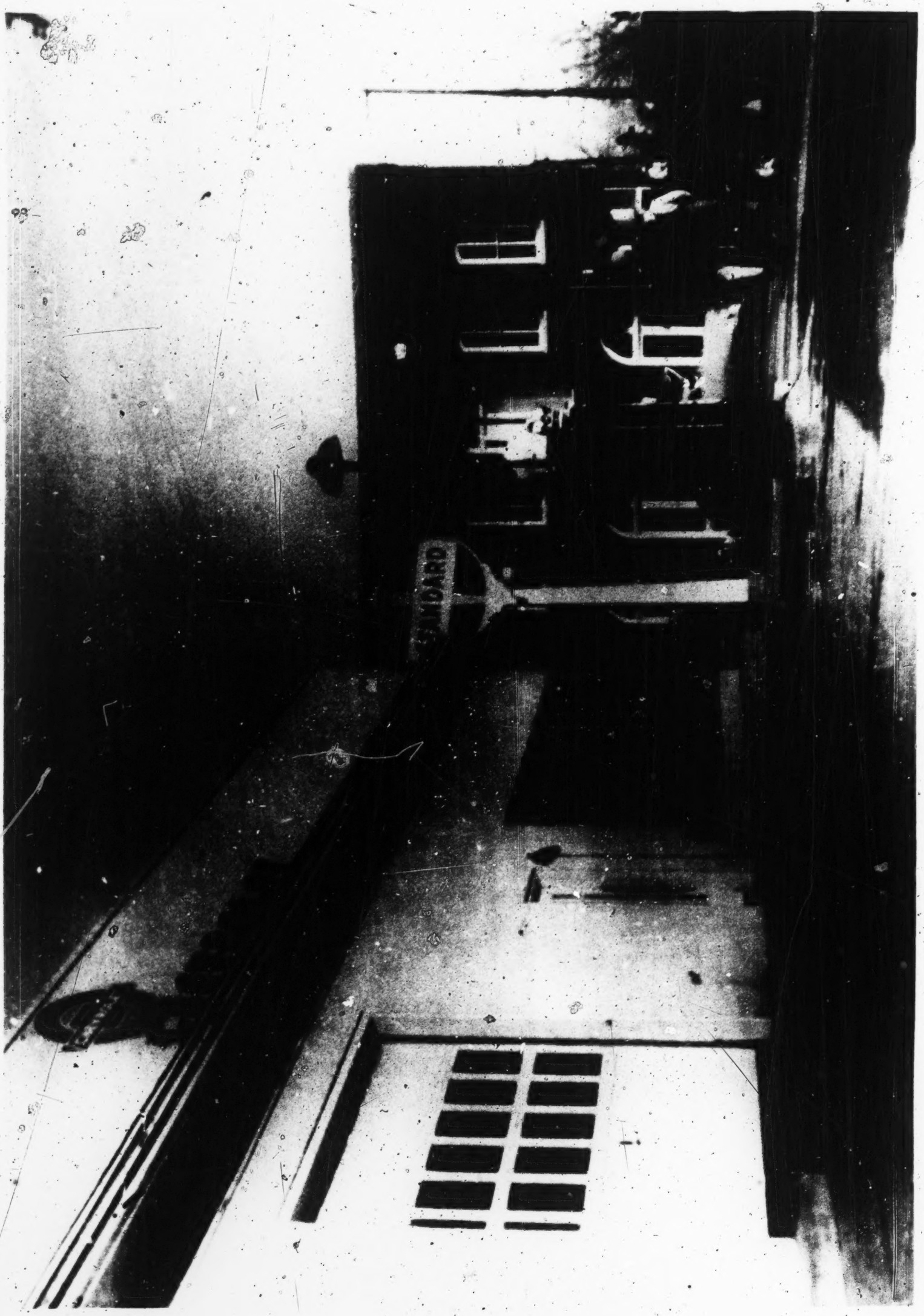
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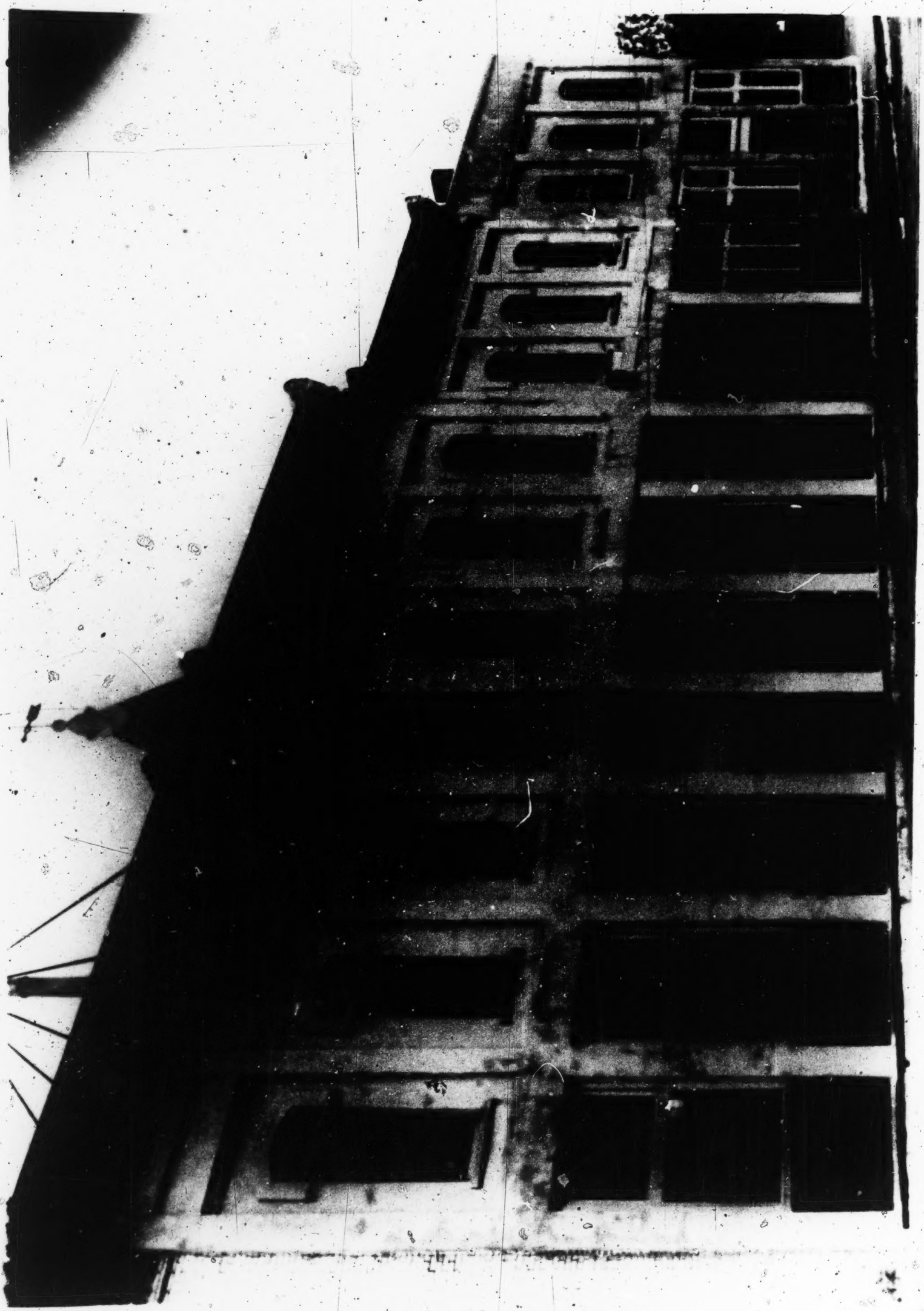

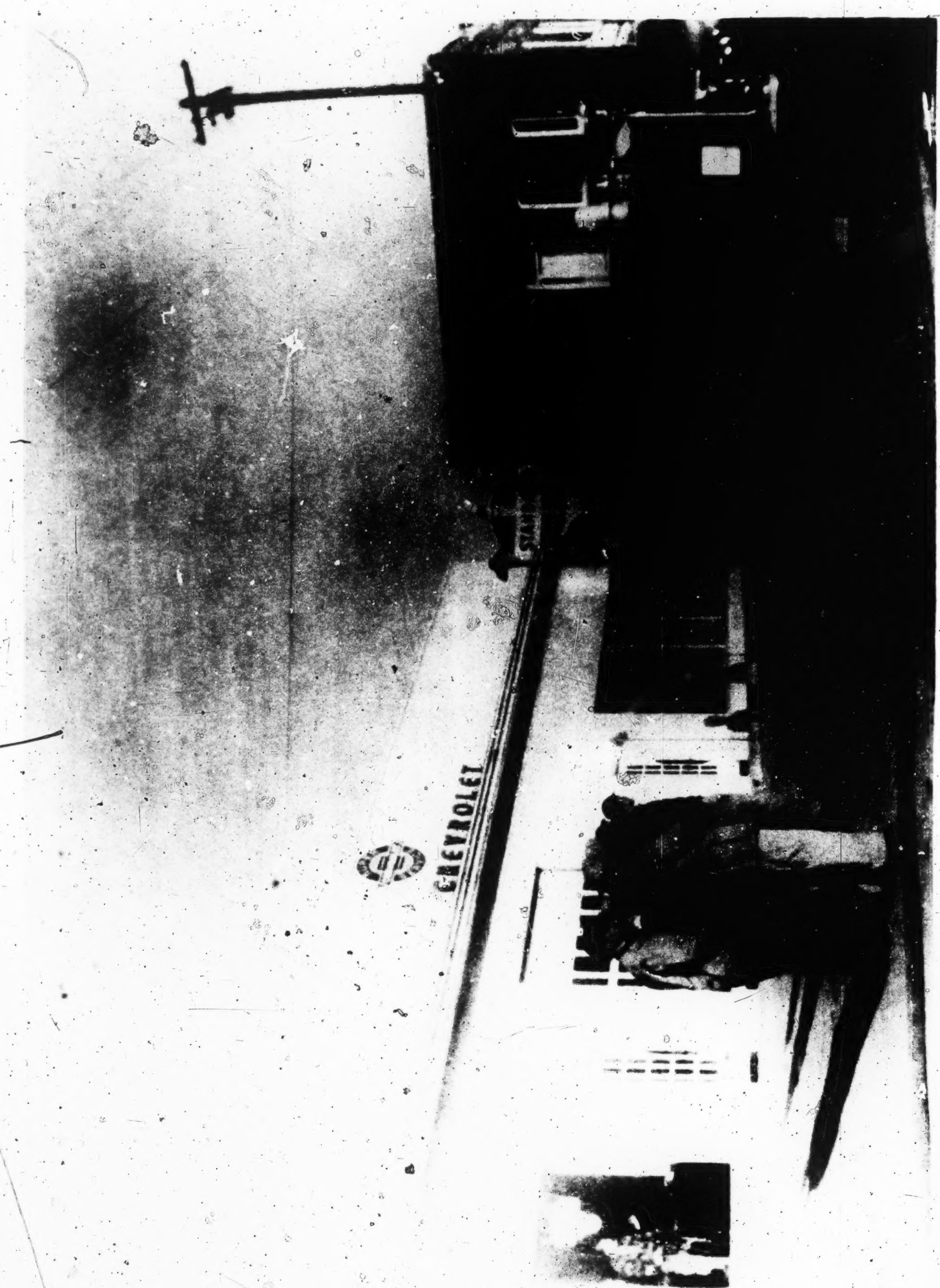
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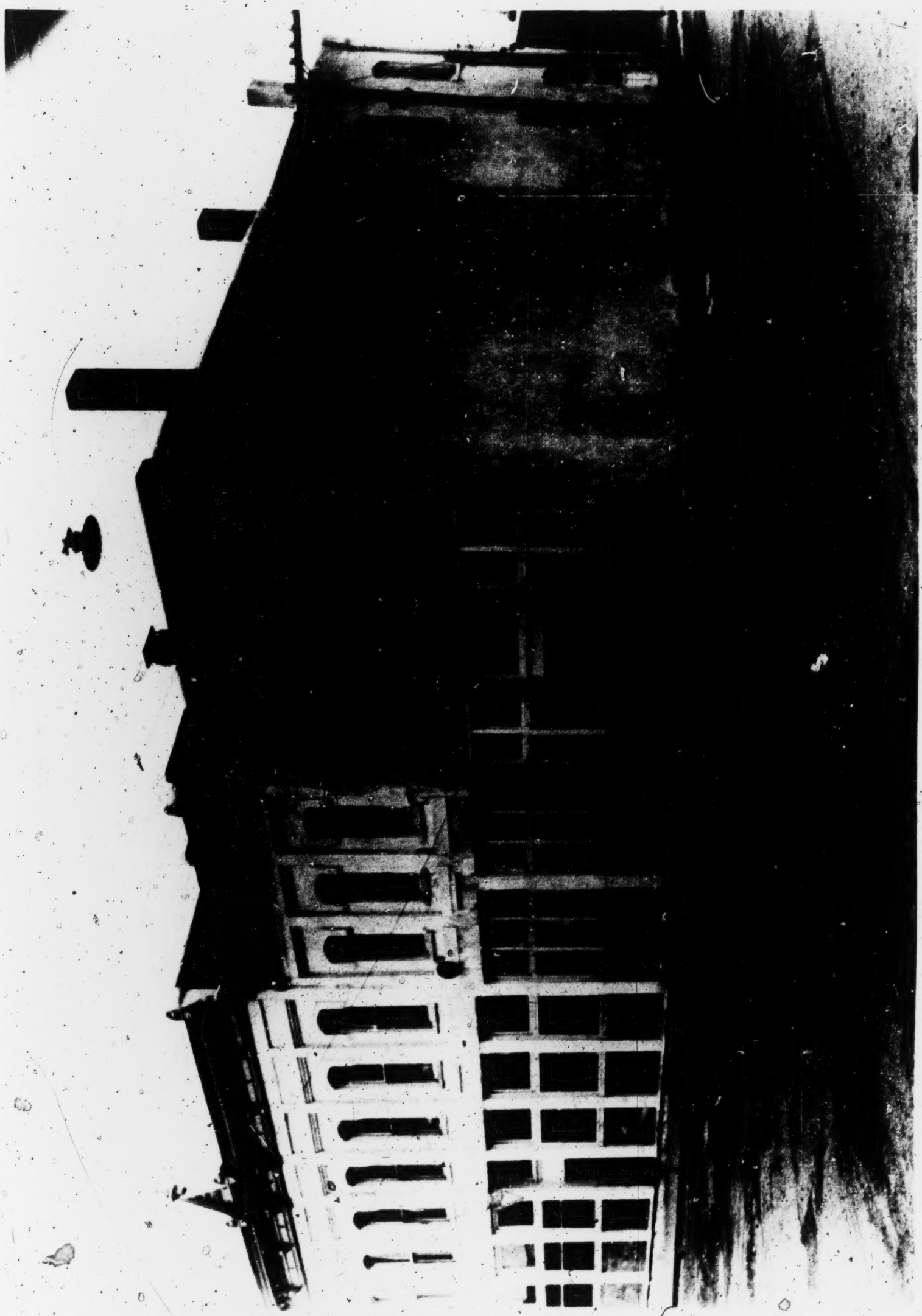
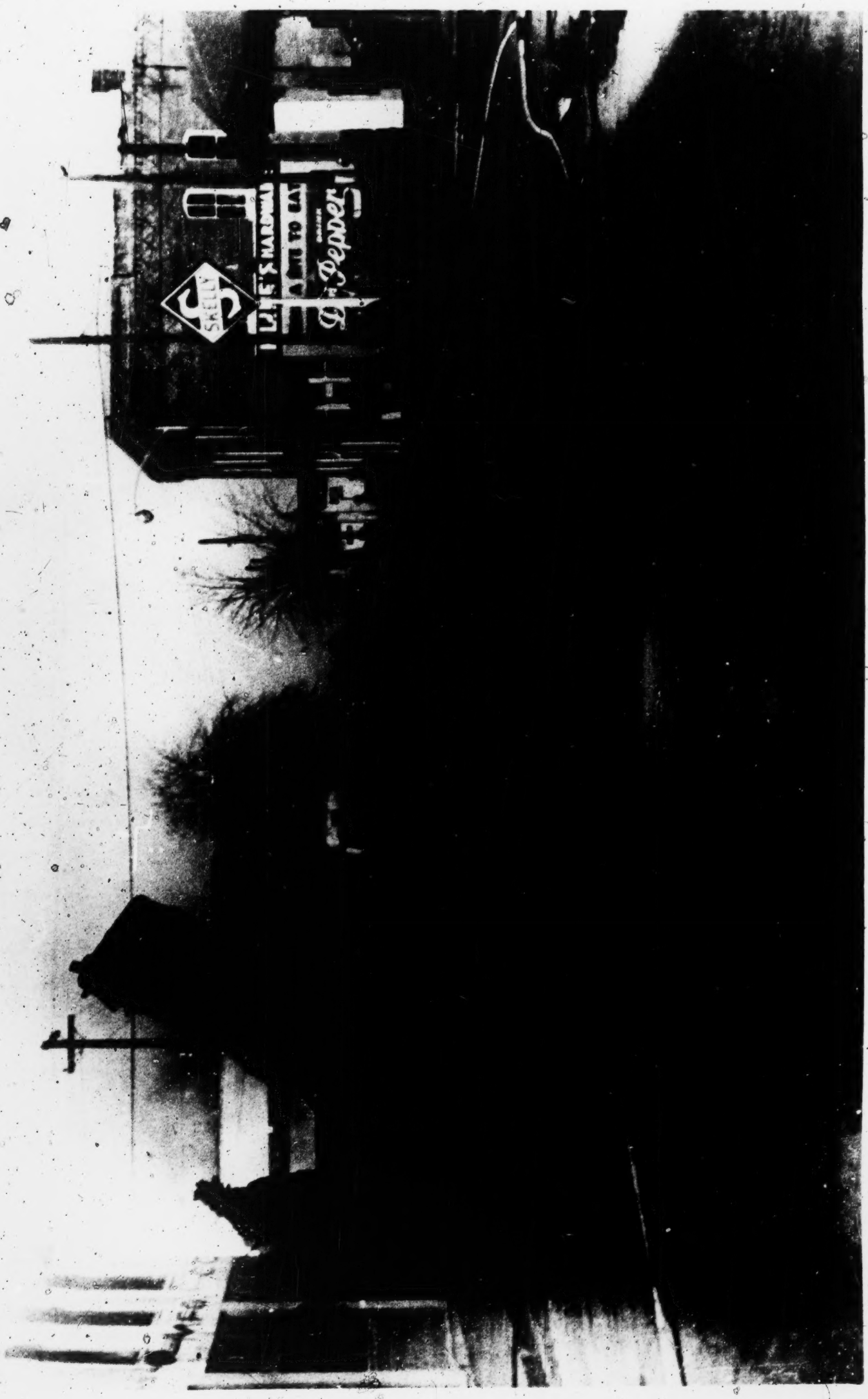
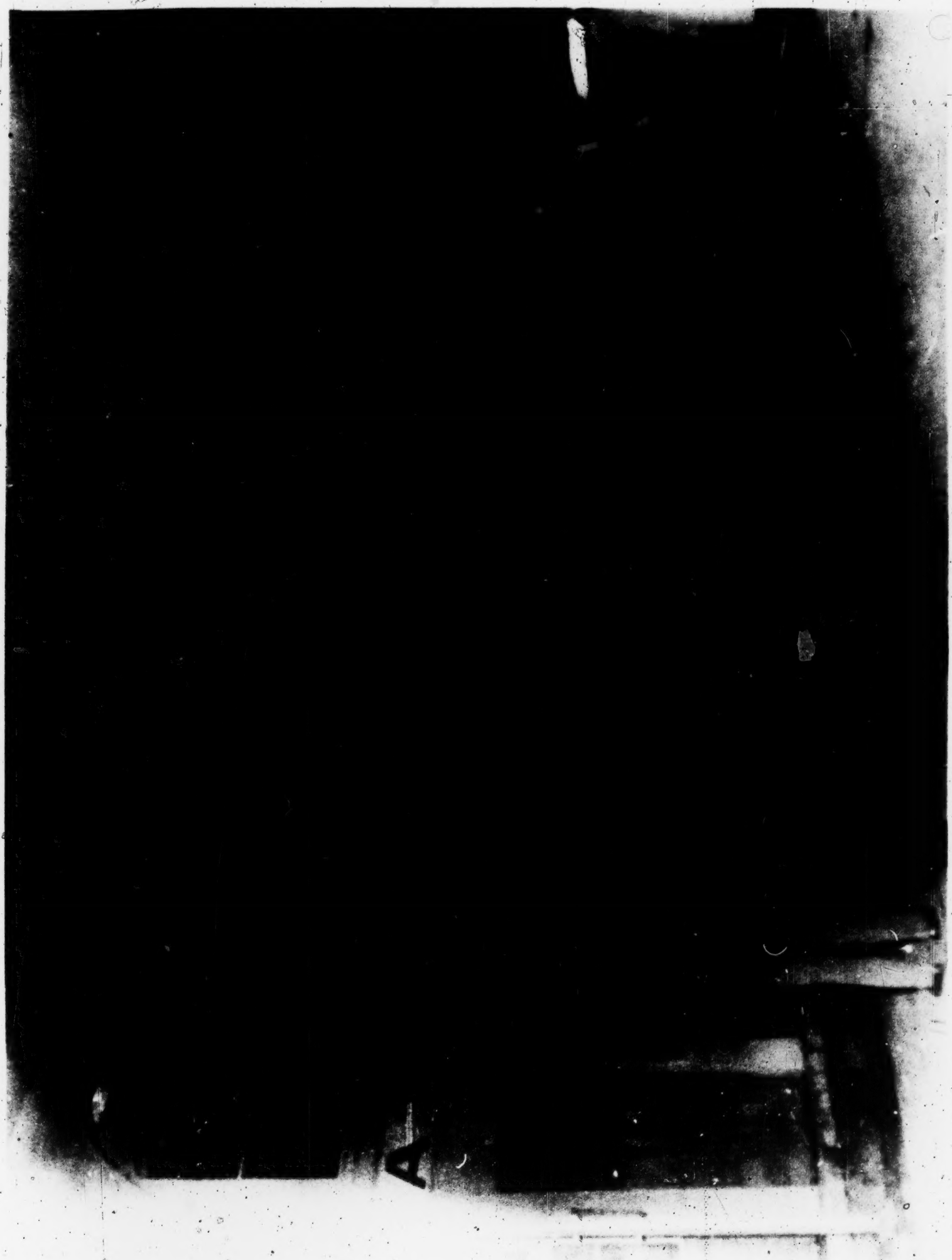
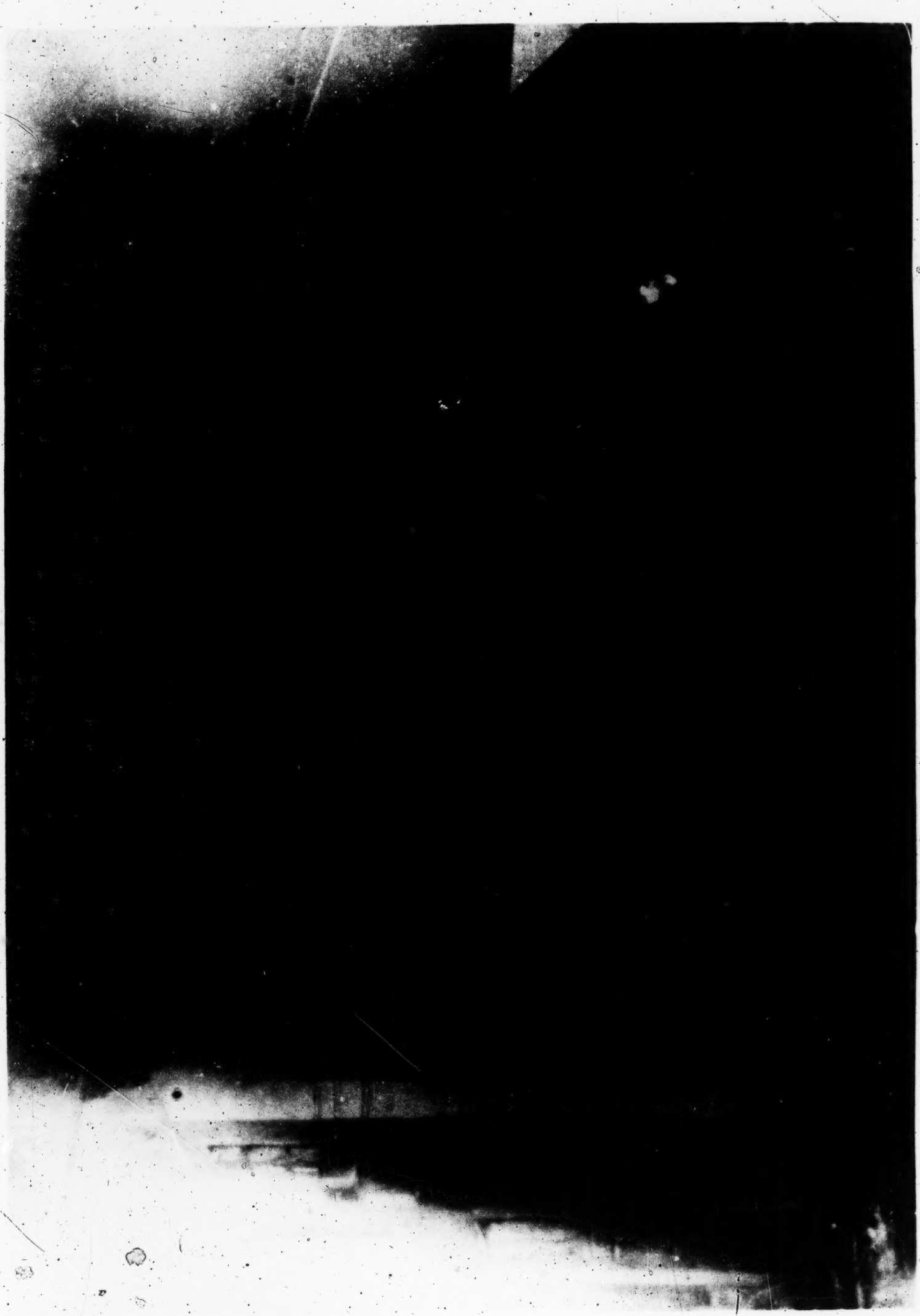
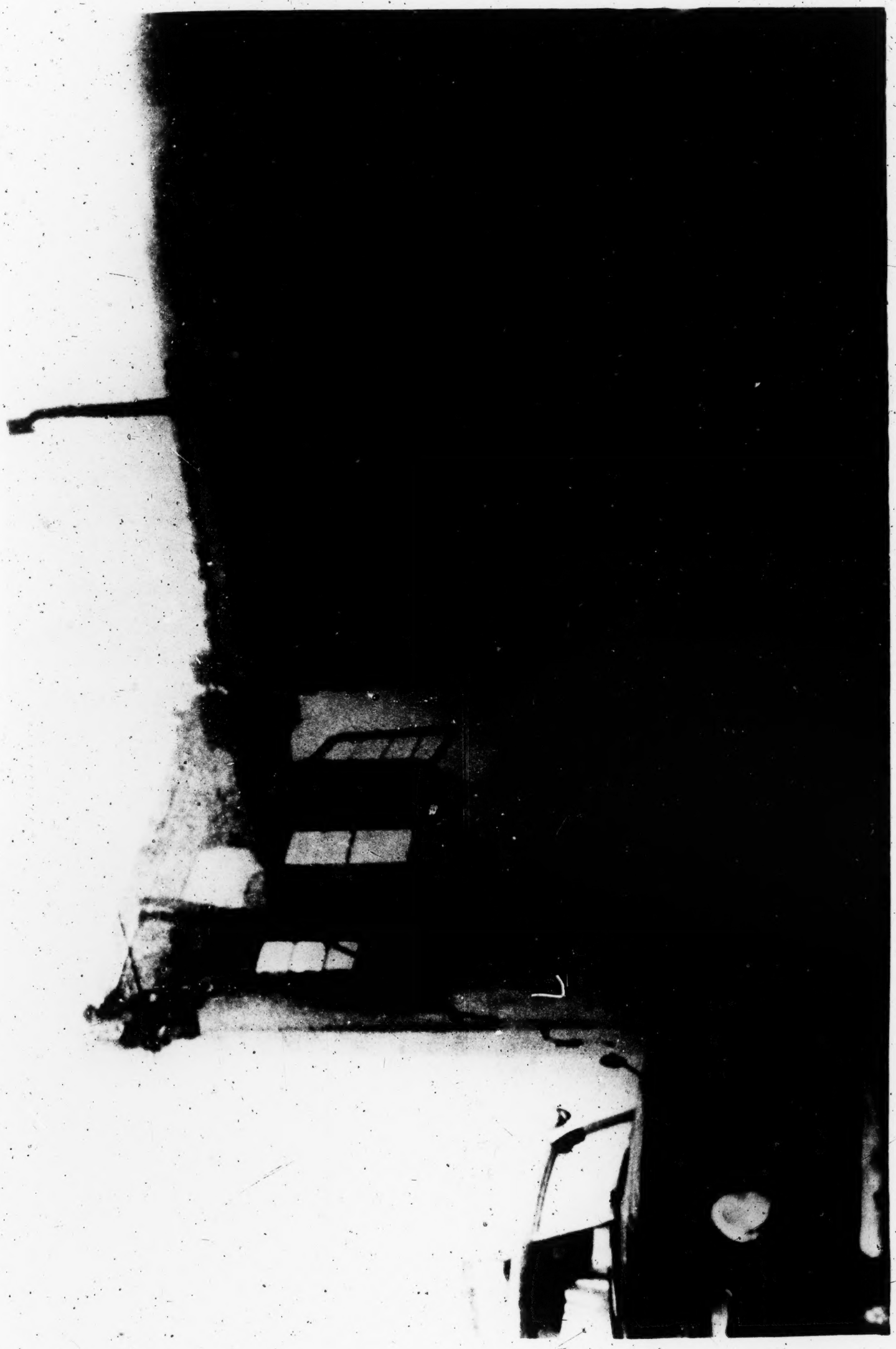



Dr Pepper
SALUTE







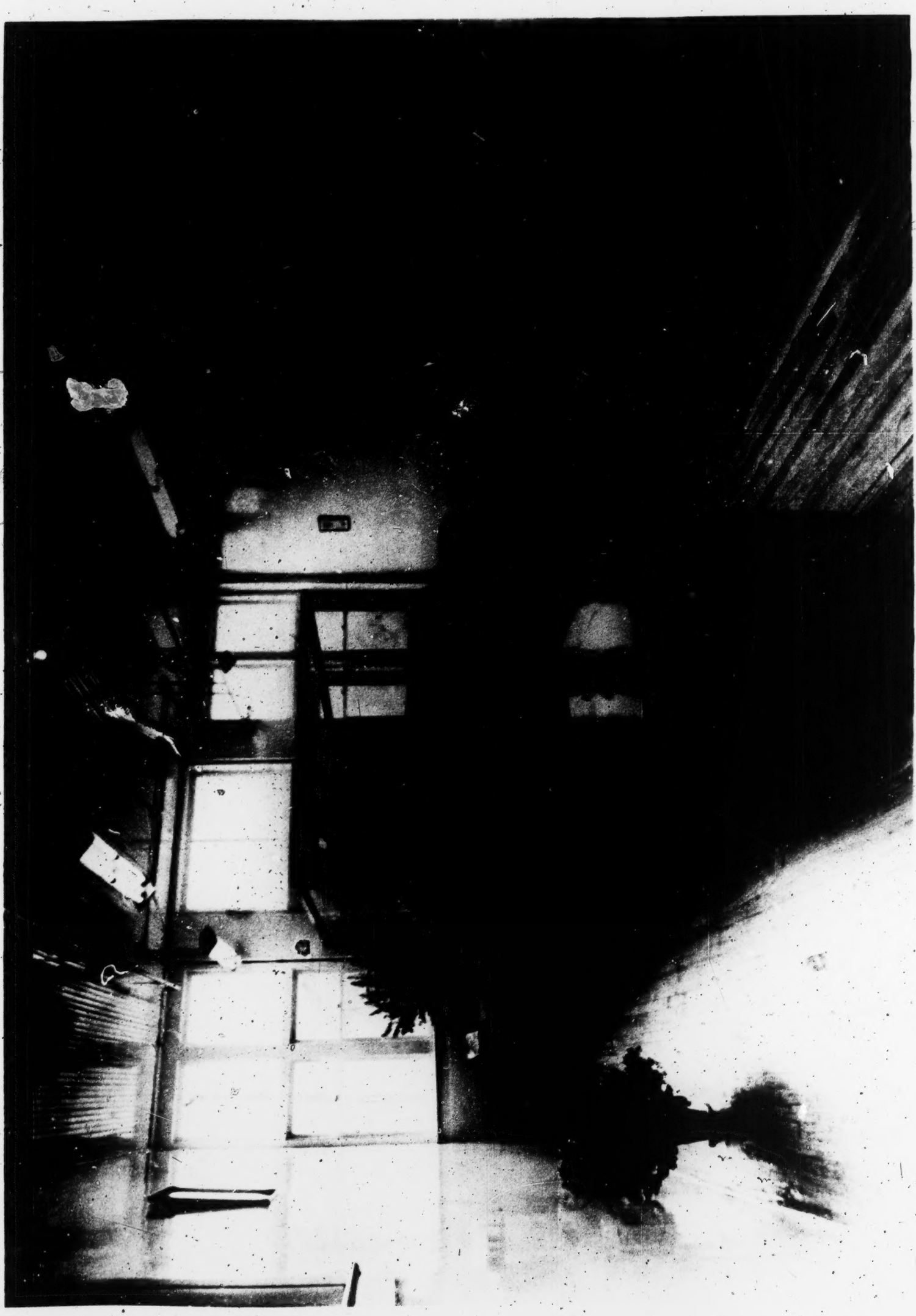
WARRANTY DEED. Form X-1

THIS INDENTURE, Made on the -9th day of November
A. D. One Thousand Nine Hundred and Forty-two by and between
J.J.Hilgert

(Dft)

of Tipton,Moniteau County,Missouri part Y of the first part and
A.F.Martin
of the County of Moniteau in the State of Missouri part Y
of the second part, WITNESSETH: That the said part Y of the first part, in consideration of the sum
of Three Thousand and no:100---- DOLLARS,
to him paid by the said part Y of the second part, the receipt of which is hereby acknowledged,
do by these presents Grant, Bargain and Sell, Convey and Confirm unto the said part of the
second part, heirs and assigns, the following described lots, tracts or parcels of land, lying,
being and situate in the County of Moniteau and State of Missouri to-wit: All

All of the west Twenty-two (22) feet of Lot Number Sixteen (16) in Block "G", in the City of Tipton, Missouri, fronting North Twenty-two (22) feet on Moniteau Street and running South One Hundred and Twenty (120) feet, and being twenty-two (22) feet wide at the south end of said 120 feet, as shown by the Recorded plat of said City on file in Recorder's office at California,Missouri. This land includes the two story brick building on the north end of said 120 feet, and the one story building on the south end of said 120 feet, now occupied by the United Telephone Co.



DETAILED ESTIMATE OF CONSTRUCTION JOB

Sheet 1 of 2

Relay 318 ft. 4" min east from west side of Norman
St. in alley between Norman & Hopkins Sts., then north
from alley 110 ft. on Norman to replace present main.

Total Expenditure $606.77

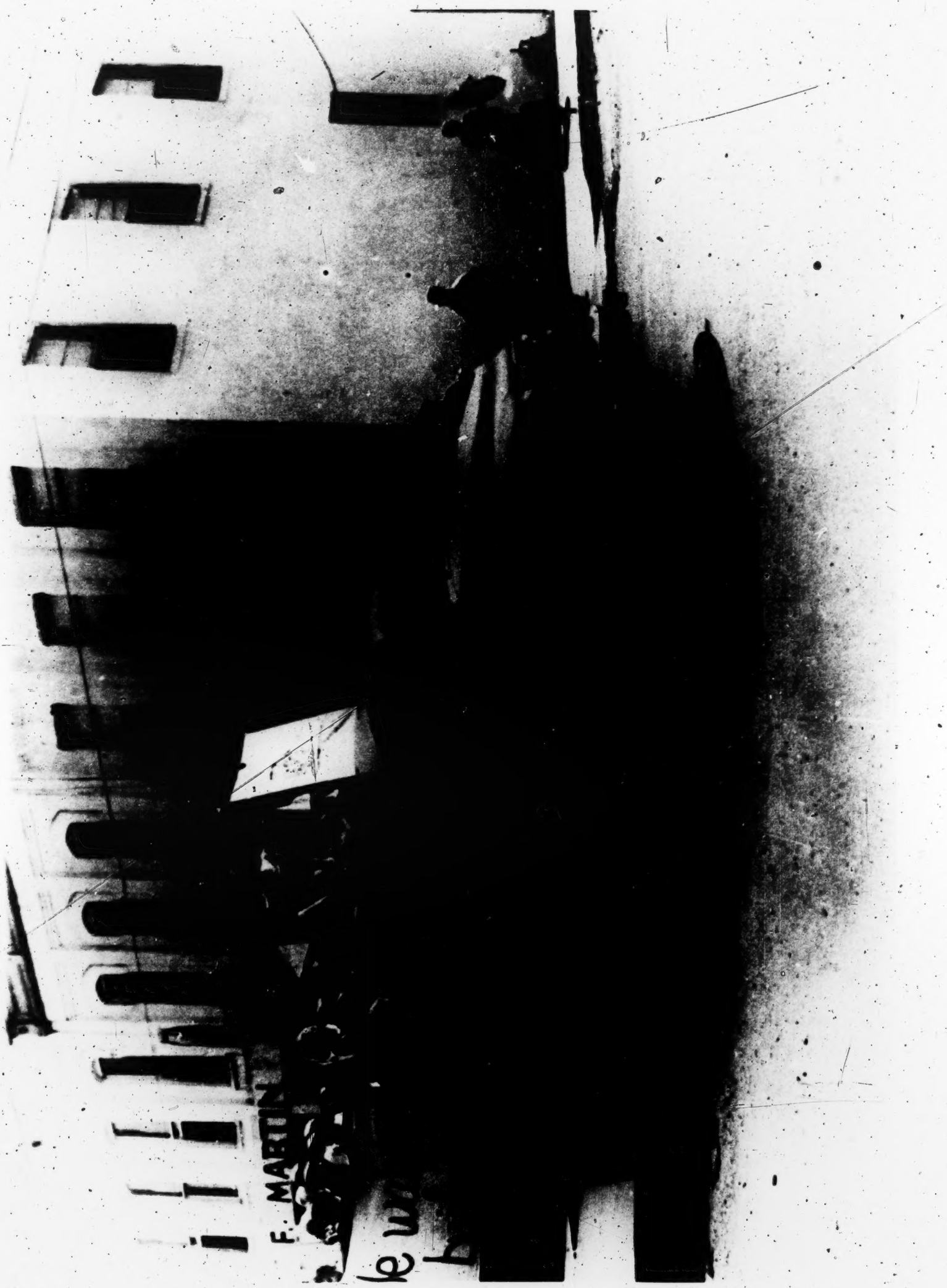
Quantity	Unit	Description of New Work Items (For this purpose combine the detailed engineering estimates and list only the quantities and items required)	Labor	Material	Other Costs	Total	Installed Quantity
	Ea.	4" S.A.E. P.E. Pipe		450.00	100.00	550.00	
	Ea.	4" S.A.E. Dresser Coupling		15.00	15.00	30.00	
	Ea.	Valve Point		10.10	80.00	90.10	
	Ea.	Assembling		9.00	25.00	34.00	
	Ea.	Flanges		12.00	25.00	37.00	
	Ea.	5/8 x 3" Rod Folding		4.00	15.00	19.00	
	Ea.	Ditch & Backfill			156.10	156.10	

Mr. 6A-2
M.A.P.
Dec. 31, 1955

24

155	Total New Work										XXX

Description of Nonbasic Work Items											


F. MARTIN

[Plaintiff's Exhibit 32]

Tipton, Missouri
March 10, 1956

My name is Lonnie Bell and I run a service station and cafe just west of Tipton, Missouri on Highway 50. I moved to Tipton from Versailles about September of 1939. When I came here I ran a cafe in a building owned by Mr Hilgert. This is the same building that was wrecked in an explosion and fire last year. When I moved in the cafe, which was on the ground floor, there was already gas in the building. We may have had a pipe or something put inside the cafe after I moved in, but the gas was already piped to the building by the time I got to Tipton. I believe gas was used in the upstairs part of my building by the time I moved in. The telephone company may have had their office upstairs when I first moved in, but I don't know or remember for certain now. A fellow by the name of Ronnie Smith or Schmidt moved in to the place I rented after I left. I have no idea when the service pipe to the meter had been put in. It was in when I first came to Tipton.

Lonnie Bell

[32]

AGREEMENT

made this 21 day of September, 193[illegible],

[illegible] UNITED GAS UTILITIES COMPANY, a corporation, with offices at [illegible], hereinafter called the "Company", and D. C. Hardy of Tyler, Tex., hereinafter

[illegible] in consideration of the sum of One Dollar ($1.00) to [illegible] paid by Applicant, receipt whereof is hereby acknowledged and [illegible] covenants and agreements hereinafter contained, the parties

[illegible] agrees at its own cost and expense to lay and install a [illegible] Applicant's property from Company's mains located in the [illegible] Applicant's property line to the inner side of Applicant's [illegible] for the conveyance and use of gas. Upon completion of said [illegible] consideration herein mentioned, the Company agrees that that [illegible] line from the curb box at or near Applicant's property line [illegible] will shall by this become the sole property of the [illegible], fittings and appliances shall be maintained by [illegible] and [illegible].

[illegible] said service line from Applicant's curb box [illegible] and to claim the same as his sole property and agrees that [illegible] the Company free, clear and harmless from any and all liabilities [illegible] or expense by reason of accidents of every kind and [illegible] or indirectly from the use of said service line in conveying

...ments and agreements hereinafter contained, the parties

...agrees at its own cost and expense to lay and install a ...Applicant's property from Company's mains located in the ...Applicant's property line to the inner side of Applicant's ...for the conveyance and use of gas. Upon completion of said ...considerations herein mentioned, the Company agrees that that ...line from the curb box at or near Applicant's property line ...of basement wall shall be and become the sole property of the ...necessary pipes, fittings and appliances shall be installed by ...cost and expense.

...completion of said service line from Applicant's curb box to said ...agrees to accept the same as his sole property and agrees that ...the Company free, clear and harmless from any and all lia- ...suit or damage by reason of accidents of every kind and ...ly or indirectly from the use of said service line in conveying ...agrees that in consideration of the expenditure incurred by ...ing said service line, he will use gas in his residence.

...hands and seals of the parties the day and year first above

x D Baker by
Applicant

DFT. EX. 39
B I C

CENTRAL STATES GAS UTILITIES COMPANY

By B R Bay
Vice Pres

...

SUPREME COURT U.S.

FILED
SEP 24 1957
JOHN T. FEY, Clerk

No. 501

SUPPLEMENTAL RECORD

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

Nos. 15,698, 15,699 and No. 15,700.

CIVIL.

NAOMI WOOD, *Appellant,* vs. THE GAS SERVICE COMPANY, *Appellee.*	**No. 15,698.**
ALFRED F. MARTIN, *Appellant,* vs. THE GAS SERVICE COMPANY, *Appellee.*	**No. 15,699.**
BILTWELL COMPANY, INC., TIPTON MANUFACTURING CO., GLENRIDGE TROUSERS COMPANY, AND EMBASSY MANUFACTURING COMPANY, *Appellants,* vs. THE GAS SERVICE COMPANY, *Appellee.*	**No. 15,700.**

APPEALED FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION.

HONORABLE ALBERT A. RIDGE, JUDGE.

E. L. MENDENHALL, INC., 1108 OAK STREET, KANSAS CITY 6, MO., HARRISON 1-3030

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

Nos. 15,698, 15,699 and No. 15,700.

CIVIL.

NAOMI WOOD, *Appellant,* vs. THE GAS SERVICE COMPANY, *Appellee.*		**No. 15,698.**
ALFRED F. MARTIN, *Appellant,* vs. THE GAS SERVICE COMPANY, *Appellee.*		**No. 15,699.**
BILTWELL COMPANY, INC., TIPTON MANUFACTURING CO., GLENRIDGE TROUSERS COMPANY, AND EMBASSY MANUFACTURING COMPANY, *Appellants,* vs. THE GAS SERVICE COMPANY, *Appellee.*		**No. 15,700.**

APPEALED FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION.

HONORABLE ALBERT A. RIDGE, JUDGE.

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Defendant's Exhibit 1, Rules and Regulations for the Distribution of Gas Service in Tipton, Missouri—

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Plaintiffs' Exhibit 17, a Plat Showing the Location of Gas Service Lines in the Street Adjacent to the Property in Question 33

Plaintiffs' Exhibit 23, Deed Dated November 9, 1942, for the West Twenty-Two Feet, or the Hilgert Building, Page 2 35

In accordance with the provisions of Rule 10 (c) appellee submits the following supplemental record solely for the purpose of correcting inaccuracies and supplying omissions of essential portions of the entire record, as those inaccuracies and omissions appear in appellants' record herein. In correcting inaccuracies, appellee limits those parts of the testimony of given witnesses quoted to the corrections and such part of the testimony of the witness as may be necessary to show the correction and the substance of the evidence at the point where it appeared. References are to the original printed record.

PLAINTIFFS' EVIDENCE.

J. J. BRANT, on behalf of the plaintiffs, testified (18-19):

Direct Examination.

The following omission in the second paragraph of testimony on Page 18 should be added to that paragraph:[1]

> **"I think we moved out of those second floor quarters in 1938."**

Correcting the first sentence of the third paragraph on Page 18, the witness did not testify that "* * * we received it in our second floor quarters * * *," but actually said:

> "I think gas came to Tipton in 1932 and I believe **we were** one of the first users."

Correcting the first sentence of the first paragraph on Page 19, the witness stated:

> **"I don't know,** but I think at one time the gas company would lay your line to your residence for one dollar."

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[1]Throughout the Supplemental Record corrections or additions will be shown in bold face type.

Cross Examination.

Correcting the entire paragraph narrating the cross-examination, the witness testified as follows (19):

> **"I don't remember whether it is a fact that at the time gas service came into that building there was a gas line way back on the alley back of the building and that the gas service came into the building from the alley back of the building the telephone company was in. I just know that the meter is there because sometime in the many years I have been going back and forth there I have known that there was a meter out there on the sidewalk.** I could not definitely say when **it was put there** without some record. **I could not say whether it was 1938, 1939, 1940 or what.** I do not remember whether **the meter out there was even put in at the time** they ran any kind of a line across the street. **I do not even know who put that in. I don't** know whether a plumber put **that** line in **that comes up to the meter,** or just who did. I cannot say that the gas company put it in. **All I can say is that whatever and wherever the gas service came from that was originally in the building, whoever put that in, I do not** know who paid for **that or who did it."**

MARTIN S. BATTLES, on behalf of plaintiffs, testified (19-21):

Direct Examination.

Correcting the first paragraph of the testimony at the bottom of Page 19, the quoted testimony "I heard a noise, a kind of a thud;" should read **"I heard a kind of a thud;".**

Correcting the testimony in the first paragraph at the top of Page 20, the testimony reading "I went maybe one hundred feet to the depot," should read **"I went maybe one hundred to one hundred fifty feet to the depot."**

Further correcting the second sentence thereafter in the same paragraph, the sentence "She exploded and fire followed that," should read **"That was when she exploded and fire followed that."**

The following sentence should be added at the end of the second paragraph on Page 20, having been omitted:

"I did not know what caused either one of these noises that I heard."

Cross Examination.

Because of a number of corrections and additions in the cross-examination, this portion is being rewritten in its entirety as follows (20-21):

"The noise was a kind of thud, it was very loud. In a way, it sounded like **something** cracking or breaking. **I didn't stand there a second. I whirled right there. I looked up there and didn't see anything; then that truck drove over to the depot and I went right over there.** I ran over to the depot and right back where I saw everything was all right and had gotten to the Ford Garage. The Ford Garage was about one-third of a block from the factory on the opposite side of the street. It was about 100, 125 or 150 feet from where I was when I heard the first noise to the depot. I just whirled around and came right back running. **I went to about a third of a block east of the Martin building. That is when the explosion happened, when I was up there. That noise was louder than the other one.** I wouldn't know how long it took me to cover the distance that I covered between the two noises, maybe three minutes, something like that. **I didn't know where the first noise came from. When I heard the second noise is when I saw the fire and stuff flying from the factory.** It seemed like the flames were going north and northwest. I went home to tell my wife what had happened and came back to the scene in a few minutes.

"I do not remember seeing a door on the north of the building. I do not know whether the door I saw on the west had glass in it. I do not know how it got there. I do not remember what kind of door it was on the north of the Martin building leading to the apartment. The fire that I saw came out of the roof on top on the northwest corner, it seemed like. **It was not**

at the top but out of the second floor. It was right where her apartment was, the way I saw it."

Re-Direct Examination.

Correcting the last sentence of the re-direct examination of this witness on Page 21, that sentence reading "From the time of the blast I ran 100 or 150 feet to the depot, then ran back about 200 feet when I heard the second noise," should be corrected so as to read **"From the time of the first noise until I heard the second noise** I ran 100 to 150 feet **toward the depot. I didn't stay there, but** ran back **that 100 to 150 feet and then 200 feet up to the garage. I ran around 300 to 350 feet between the noises."**

MELVIN FRY, on behalf of plaintiffs, testified (21-23):

Cross Examination.

Because of substantial omissions in the cross-examination of this witness on Page 22 of appellants' record, the cross-examination of this witness, including the addition of those portions omitted is repeated as follows:

"I live about five blocks from the Martin building. Someone called me and told me of the fire, I did not hear the alarm or the explosion. I was asleep. **It did not rattle any windows that I know of in my house or make any noise sufficient to wake me up out of a sleep.**

"When I got over there a fire was burning on the second floor of the second building from the corner, back over inside. I did not go into the Martin building when I arrived. I don't think anyone would have gone in at that time. Exhibit 21 shows the way the west wall looked part of the time that there was a fire inside. In the picture **the west wall is down,** some of the brick and stuff is out over the curbline into the street. There was some out there while the fire was still burning. The picture is something like what it looked like before daylight. **A part of the**

roof was down at an angle across the building as shown in the photograph when I arrived. Part of the debris. The fire that I saw when I arrived was back of the word 'C-O' on Exhibit 20, between that west wall in there between that building and the end building. I stayed around until daylight. (Witness identifies Exhibit I3 as a picture that was taken the next morning looking from the west side southeast into the building.) **The wall between the west building and the next building was down like it is in that photograph."**

ALFRED F. MARTIN, on behalf of plaintiffs, testified (23-32):

The following testimony omitted in Paragraph 2, Page 23, should be inserted immediately after the third sentence of that paragraph:

"On my arrival there I noticed that the west wall with the exception of the front part was still up and 2 to 3 feet of wall from the sidewalk on up was still up."

Correcting the next to the last paragraph on Page 25, describing a discussion out of the hearing of the jury concerning the proposed evidence, the summary of that discussion should be corrected to read as follows:

"(Thereupon there was a discusation out of the hearing of the jury **in which plaintiffs stated that it was plaintiffs' theory that the Gas Company was negligent in not either repairing or shutting off and warning and giving the customer a chance to repair after having knowledge of defective pipe or knowledge of circumstances that would put it on inquiry, which inquiry would have revealed the defective pipe. Plaintiffs stated that they would prove in support of that theory that several years prior to the explosion the Gas Company had discovered through complaints which caused them to inspect that the 34 feet of the**

service line was so corroded and leaking that it had to be replaced and that 625 feet of the pipe in the 4 inch main, 110 feet of which was between the main connection involved in this case and the alley, was so corroded that it had to be replaced; that 525 feet in the alley was in the same condition. Plaintiffs stated that they would prove that that condition was a warning that in other pipe of like age in the same area that there was a strong likelihood of leaks but that the company did not inspect this particular pipe. Plaintiffs contended that if the defendant had knowledge of facts or circumstances that would put a reasonable person handling a dangerous commodity on inquiry and that the inquiry would have revealed a defective pipe, there was a duty to repair or warn whoever might be affected so that the owner of the pipes would be given a chance to repair. It was plaintiffs' stated position that regardless of who owned the pipe it was a question for the jury whether the company should have discovered a leak and should have done something about it. Plaintiffs further stated that they were going on both theories, that is, that the pipe was Martin's pipe or the Gas Company's pipe, on the theory that these were not inconsistent. This discussion included the following:"

Cross Examination.

Correcting the first paragraph of the cross-examination on Page 27, the sixth sentence, which reads "I, as tenant, did not pay for the service when it was put in that east building," should be corrected to read, **"All I know is that I did not pay for the service when it was put in that east building."**

Correcting the second paragraph of the cross-examination on Page 27, the following omission should be inserted following the third sentence in that paragraph:

"I am not sure whether there was any space between the walk and the building in 1936. I am not sure of those things twenty years ago."

The following omission should be supplied at the end of that same paragraph on Page 27:

"I have a little difficulty remembering that."

The last paragraph on Page 27 should be corrected in its entirety because of certain misstatements and omissions, to read as follows:

"I believe the service pipe was taken out the second or third day after the fire. **I was there at the time.** I saw the men digging there, but I did not know what they were digging for. I did not ask them any questions. **I did not know the reasons they were taking the pipe out and I did not ask any questions. I did not complain about it. I didn't know that I had any reason to complain. I did not protest to anybody about it."**

Because of substantial omissions and corrections in the first paragraph on Page 28 of the record, that paragraph, as corrected is herewith quoted in its entirety:

"I bought the first building on the east in 1939. I next bought the middle building and then the west building. With all three buildings I had ninety-four foot of frontage and two hundred feet deep. The two story building was sixty feet deep. When I bought the buildings they all had solid walls between them. I did not know how old they were. The photograph marked Exhibit 15 has a date 1890 at the peak. They were probably about fifty years old when I bought them. They had brick walls. I took out the wall between the east building and the middle building, and put an eighteen inch steel beam north and south and a steel beam east and west with steel columns to support it. **The east building was twenty-two feet wide when I purchased it.** When I took the wall out it left the upstairs just one room as far as the east building and the middle building were concerned. I had columns supporting the beams on the first floor and the second floor was supporting the joists. **The twelve inch joists were anchored just into the brick walls.**

There was no other anchorage that I knew of on either of the side walls. I later cut archways eight feet wide in the east wall of the middle building after I purchased the middle building. I had three archways on each floor. The wall itself was fifty-five feet long. **In that length I had three eight foot openings cut in it. I put no beams in underneath the floor at the time when I cut those arches. When I finished the floor that came into the west brick wall was just the joists into the brick.** When I put the stucco on the west side of the building, there was some humidity on the inside of the first floor; but none upstairs. The only way you could put the Johns-Manville plasterboard was to tack strips and then put the plasterboard on the strips, and that is what I did. We drove nails into the brick on the west wall. When I finished that I put stucco on the brick facing of the west wall in 1942."

Correcting the paragraph at the top of Page 29, the third sentence in that paragraph, which reads "About December, 1954, some machines were moved from downstairs to the upper part of the factory," should be corrected to read, "**About December, 1954, much machinery was moved from downstairs to the upstairs part of the factory.**"

The following sentences should be added to the first paragraph on Page 29, having been omitted:

"I did not strengthen the floor joists at any point on the second floor at that time. I did not have any engineer check it."

Because of substantial errors in the second paragraph on Page 29 of the record, that paragraph, as corrected, is as follows:

"After the fire we noticed that the second floor **east wall, ninety-four feet east of the corner was bulged away from the floor. It was bulged away from those joists in the floor from a half to three-quarters of an inch. There was no fire damage or breaking or anything in the way of debris on that east wall. The**

ceiling was scorched twenty-five feet east of the west building and there was water damage."

SAM THIXTON, on behalf of plaintiffs, testified (32-33):

Direct Examination.

The first sentence of the second paragraph of this witness' testimony on Page 32 of the record, reading "I recall when a line was laid across Moreau Street from the main near the west edge of the street to the building then known as the Hilgert building," should be corrected to read, "I recall **that** a line was laid across Moreau Street from the main near the west edge of the street to the building then known as the Hilgert building."

The third sentence in that same paragraph which reads "As far as I can remember this took place in 1932 or 1933, something like that." should be corrected to read "As far as I can remember **I would think** this took place in 1932 or 1933, something like that."

BAYARD R. BRICK, on behalf of plaintiffs, testified (35-45):

Direct Examination.

Because of errors and omissions in that paragraph appearing at the bottom of Page 36 and the top of Page 37 of the record, the following is a corrected and supplemented narrative of that paragraph:

"We dug the trench down more than three feet and examined the basement wall. The wall of the building itself was all crumbled into the street. **There were a few courses of brick on top of the foundation.** We found thirteen inch masonry and rather large stones that were mortared into place. The mortar was in **rather** bad shape, soft and chalky. The **brick wall** and masonry wall was quite porous. A three-fourths inch hole was found through it, also a two inch galvanized pipe was found to pierce that foundation and extended

out into the street **under** the sidewalk. Piercing the first floor right opposite the trench was found a ventilating register 18 by 22 inches. The corner building was sixty feet north and south, two stories, and abutted on a one-story building to the south. **The south second story wall was the one thrown over on the first floor and had collapsed the one story roof. The intact roof section was found over on the street side."**

Because of omissions in the paragraph at the top of Page 38 of the record, the following is a restatement of the first eight lines of that paragraph, with the omitted testimony supplied:

"In my opinion the hole in the pipe was caused by soil corrosion. Examination of the pipe shows that the metal has slowly disappeared until it completely disappeared over the hole and pitches up at the feathered edge. The rest of the pipe shows tuberculation of corrosion products, also deep pitting, **with large areas of the surface pitted.** All this is characteristic of soil corrosion. **Soil corrosion in a pipe of this sort is always spotted. A section of the pipe, usually the pipe itself over most of its length, shows some evidence of corrosion, but in places it will be deep and in other places will be very shallow, as here. I have often seen pipe that you have a hole through completely in one place, the rest of the pipe sound, at least not having a hole through it.** There are characteristic signs of soil corrosion over all portions of the pipe that was below the ground, **some of it deeper than others, with the deepest end most extensive at the elbow * * * ."**

Cross Examination.

Because of substantial omissions and errors in the first and second paragraphs of the cross-examination on Pages 40 and 41 of the record, the following is supplied as a corrected and complete narrative:

"My only degree is in chemical engineering. **I have no degrees in metallurgy or in soils.** Different metals will corrode at a different rate in the same soils, and

the same metal will corrode at different rates in different soils, but the same metal in the same kind of soil will corrode roughly at the same rate. On this particular pipe, there is a different degree of corrosion, **just twenty inches from the hole** in the sense that at one point it is corroded through and at other points it is not corroded through. I did not check the soil outside this building except to look at it. Where a pipe has been buried in the soil for sometime the best indication of the corrosiveness of the soil is the experience of the pipe that has been in that particular soil. Soil corrosion is a complex factor and it is difficult to tell what experience will be obtained, from examination of one particular soil. **The condition of the soil at the point where the break was, was of no importance.** In this particular case, in my opinion, it was irrelevant to determine right at that time the acidity of the soil, the aeration of it, the resistivity, the moisture and all factors having to do with corrosion. The corrosive condition of the pipe was a better indication of the corrosiveness of that particular soil than any chemical investigation of the soil I could have made. I did not take a sample of the soil. All the rest of this pipe is **fairly sound** in the sense that there are no holes in it and it would carry gas. **It is a fairly sound piece of pipe.** If gas is escaping into the adjacent soil from a hole of any size you will find chemical evidence of said gas in the soil. **That is important in determining whether gas from that particular hole is going through the soil.** I investigated that as well as I could. I believe the soil was loam. **I made no further investigation of the soil.** I have no records on the nature of the soil. I took none of the soil back to the laboratory. (The Court refuses to let the witness explain his answer.) I made some tests right at the place where the pipe had been. **I made no record whatsoever of such tests.**

"As compared with sandy soil, loam is not a porous type of soil. It is a sort of clay soil. Such soil will stick to something that it is around **especially if it has been there for some time.** With qualifications, it will happen around a pipe. The corrosive scale will many

times remain on the pipe. **Even when corroded all the way through, I have seen scale still remain there and no evidence of a leak through the pipe. That is particularly helped and aided just like putting a Band Aid or a bandage on something when you have got some sort of an adhesive type soil that holds that in place. I know that it can happen that you can get a shaking of the pipe or something dropping on the pipe and that will shake the soil and cause the scale to shake off, leaving a hole like the one in this pipe. Running a hand down a pipe which is corroded can cause the scale to flake off which otherwise if immobilized, might stay on that pipe for many, many years.** The pipe itself is an indication of the corrosive condition of the soil."

The first sentence of the second paragraph on Page 41 which reads, "There is always a flash with an explosion," should be corrected and supplemented to read, "There is always a flash **and fire** with an explosion. **I have never seen a gas explosion without a flash of fire at the point of accumulation right at the time of the explosion.**"

The seventh sentence of that same paragraph which reads, "An explosion will follow the line of least resistance." should be corrected to read, "**A gas** explosion will follow the line of least resistance."

Because of substantial omissions and errors in the second paragraph on Page 42 of the record, which extends over to the top of Page 43 and completes the cross-examination of the witness, that portion of his testimony, as corrected and supplemented should be as follows:

"In that time, whatever that might be, twenty four hours a day, gas would be coming out of that hole under four pounds per square inch pressure. I knew this building was closed the same way every weekend, not only this weekend, but the weekend before, the weekend before that, the month before that, six months before that. If gas was coming in there on this weekend from that hole, then every weekend for the time that this hole had been in this condition, gas would have gone into that building the same way. Probably at

times it reached dangerous proportions but didn't happen to be ignited. The earth having removed the mercaptan, it would be odorless, or at the most have a stale odor. Even though it had been working the same way every weekend and the thermostat had been going on and off every weekend, it just happened on January 31, 1955, the one weekend out of all the others, the building blew up. It is always characteristic of a hazardous condition that at one time or another, maybe after a considerable period of time, it gets ignited and blows up. I used an explosive meter around where the pipe had been to determine whether there was a residue of gas in the soil. **I said in my deposition that I had no record of the nature of the soil and that I made no further investigation of the soil. I also said in my deposition that I put the meter in cracks in the pavement in four or five places and that we played around a little bit with it. I meant by playing around that I did not test systematically. I now say that I actually made a test with that gadget in the trench but I don't have a record of it. The explosive meter is a standard method for discovering the presence of gas. A very excellent method.** Where the pipe had been the ground had already been disturbed so there was no actual chance of getting a reading. I didn't expect a reading and I didn't get one. I examined the soil and smelled of it, but I couldn't find the dirt that had been in the hole and besides it was saturated with water and you can't make such tests anyway in that case. Even the ground inside the foundation was exposed and was saturated with water and slush and ice. The center of the building was gutted by fire. The scorching on the flooring was not caused by burning embers falling on it. **The wood could have been scorched by any kind of fire.** Parts of the joists underneath the flooring were examined. In a gas explosion the fire will burn back to the point where the gas is entering if there is enough air to allow such. Whether a carbon deposit is left around the openings depends upon the sufficiency of the oxygen. I don't believe there would be any carbon deposit around the openings, perhaps in the immediate vicinity. I didn't find any carbon deposits of this type near the hole and I didn't expect it. There was

no carbon deposit in the earth and you wouldn't expect any there. Outside of the hole, the pipe was pitted in general, but not excessively, according to my deposition. **In making that statement under oath in my deposition I intended it to be a true statement at the time.** Gas will tend to diffuse equally in a space. **Therefore, it will seek to fill a container in equal proportions in all areas of the container and will not concentrate in any one place, given sufficient and considerable time.** In this courtroom it would take about a week for it to diffuse equally. That is assuming that the room is closed off and there is no motion, no people in it."

Re-Cross Examination.

The first sentence on Page 44 of the record under re-cross-examination which reads, "If the person was looking at the area where there was an explosion you could see the flash," should be corrected and supplemented so as to read, **"The very explosion of gas by any ignition will have a flash of fire right then.** If the person was looking at the area where there was an explosion you could see the **fire."**

Further correcting the recross-examination of this witness, the next to the last sentence in the first paragraph at the top of Page 45 reading, "The gas upstairs was in an explosive mixture," should be deleted in its entirety.

DR. FRED KURATA, on behalf of plaintiffs, testified (45-48):

Cross Examination.

Because of substantial errors and omissions in the setting out of the cross-examination of this witness at Pages 47 and 48 of the record, the cross-examination of this witness is being repeated in its entirety with omissions and corrections supplied. Those omissions and corrections are set forth in bold faced type. As corrected and supplemented, the cross-examination is as follows:

"Gas will come in through the foundation of a building and will travel through the ground because ground

is porous. It would go through the ground, up the crawl space, up through the registers and. if the building was air-tight, would stay there. The majority of the gas would remain on the first floor. Gas is so diffusible that it will seek uniformly all four corners of a container and would take a matter of hours to fill the first floor of this building. As gas goes through soil out of a hole under pressure, it dries out that soil. As the soil dries out it becomes a conduit itself. A loam or clay soil will not block off gas like concrete or metal. Sooner or later it would go through the eight inches of soil between a leak and the foundation of the building. It would go through at an increasing rate as the soil became more and more dried out and more and more porous. Once it goes through the soil and dries it out, then it goes through the foundations the same way. Once inside the foundation where there is dry soil, that is more easily penetrated. In reaching my opinion I am assuming that the pipe had been there since 1932 or 1933, and if that date were changed and the pipe had not been in there nearly that long, my opinion would be substantially changed. I don't want to create the impression that a hole this size had been there for five years. It probably started as a pinhole. I think it could have been substantially this size for six months, or maybe longer. During that time there would be a constant leaking of gas through all of that big hole under the ground. There would be a substantial flow into the foundation for six months. This would be going into the building in substantial quantities over a period of twenty four hours every day. If the concrete sidewalk above it was continuous and no cracks and there was no open ground in the immediate vicinity, I would say that a lot of this gas would have been going toward the building while there was a leak, but concrete is not exactly impervious; it is porous, it is masonry. Corrosion with the same type of metal will occur more or less uniformly in the same type of soil in the same immediate vicinity. There are no apparent holes in any of this pipe, but it is severely corroded. Even using a mag-

nifying glass to go up and down the pipe the elbow is the only place where a hole is obvious. I cannot tell whether the pipe, or the elbow, underground had been galvanized. The zinc, if any, would disappear underground. I do not know whether the elbow is the same quality or grade of steel as the pipe itself, but usually these standard pipes and fittings are low carbon steel. **If this pipe was dug up exposing the part that came under the street and if that was inspected no hole would be obvious or visible. You would have to go clear on back and underneath the elbow before you would ever find a visible hole in that pipe.** I have seen pipes carrying gas or water that are not corroded any worse than this pipe, with the exception of the elbow, but when the pipe gets that bad they are usually replaced. **When there is a collapse of a building with a tearing or shearing off of a pipe allowing gas to escape and explode, that gas will burn back to and continue to come out of the broken part of the pipe visible as in a blow torch.** Corrosion is a sort of scaling process and the scales might be held in position against the pipe by the surrounding ground. There would still be a leak. I have never seen a case that the hole was corroded in a pipe that the pipe was leakproof, but it could be a slow leak. It is possible that it would not cause any trouble. Assuming such circumstances, it is possible for a wall to fall on a pipe and shake the corrosion scale loose. It could not happen as long as the pipe was not displaced in the soil. If the soil surrounds the pipe, there is still no place for the corrosion products to go. The electricity in the ground can cause holes in pipes. That type of corrosion is distinct. Usually the edges of holes are not thin, the hole goes in steeply. In any type of corrosion you cannot say that it is either chemical corrosion or electrolytic corrosion, it is all combined in every case of corrosion. I took into consideration electrolytic action when I answered the hypothetical question. I made ample allowance for the electrolytic effect that you are referring to. **If you have an electrolytic process going on, naturally your corrosion will**

be faster. I cannot say how many stray currents have acted on this pipe in a five year period. I could make an estimate, an educated guess. It is physically impossible for anyone to state that any given number of electrolytic currents would have affected that particular pipe. Over a five year period there would be varying kinds of water with varying kinds of mineral acting on the particular pipe. I don't believe I have had any experience with gas pockets with natural gas. I have never had any such experience in all of my training and practical experience."

CLEMONT MCGEE, on behalf of plaintiffs, testified (50-58):

Direct Examination.

The third sentence in the first paragraph on Page 52 which reads, "The fact that there had been a gas explosion and a faulty pipe was no indication that there might have been a leak in that area," should be corrected to read, "The fact that there had been a gas explosion **indicating** a faulty pipe was no indication that there might have been a leak in that area."

The second sentence in the last paragraph on Page 52 reading "The Gas Service Company had exclusive control over the meter and did their own testing and checking of the meter, and they would not permit anyone else to test or check the meter," should be corrected to read as follows, "The Gas Service Company had exclusive control over the meter and did their own testing and checking of the meter, and they would not permit anyone else to test or check the meter **without their permission.**"

The second paragraph on Page 53 should be corrected by the addition of certain omissions, so as to read as follows:

"We tested the **customer** service lines going into Smith's Shoe Shop and Veatch Construction Company by taking a pump and gauge and pumping the line up with fifteen pounds of air. The **customer's service line**

was tested from the meter to our curb line. We turned off the stopcock at the edge of the street and pumped air into the lines at the meter connection."

The first sentence of the fifth paragraph on Page 53 reading, "When we dug up Exhibit 25 it was generally corroded. I saw the corrosion hole," should be corrected to read, "When we dug up Exhibit 25 it was generally corroded. I saw **what I assumed was** a corrosion hole. **I am not an expert on corrosion.**"

The last sentence in the fifth paragraph on Page 53 reading, "Corrosion is a slow process," should be corrected to read, "**I assume** corrosion is a slow process. **I am not qualified authority to say definitely.**"

The last sentence on Page 54 reading, "W[illegible]e find pipe such as the thirty-four feet that we replaced we do not check in the area for other leaks," should be corrected to read, "When we find pipe such as the thirty-four feet that we replaced we do not check in the area **to see what its condition is.**"

Supplementing the question, answer and objection material quoted verbatim at the top of page 55, the following should be inserted in sequence immediately thereafter:

"Q. (By Mr. James) I will ask it this way. When you or the men under your control go into a place like Moreau Street in Tipton and find for one reason or another that you have got thirty-four feet of service line that is so generally corroded that you replace it with new service line, then is it your testimony that you don't make any bar hole tests or any other tests on either side of that service line you replaced on your other lines there in that street to see if there are other leaks in pipe that is as old as that pipe was?

"Mr. Jackson: We object to that, it is the same question, argumentative, improperly quoting the witness' testimony.

"The Court: Overruled.

"A. Yes."

Cross Examination.

The fifth sentence in the first paragraph at the bottom of Page 56 reading "We don't test any customer's line beyond the curbcock and the customer's meter," should be corrected to read, "We don't test any customer's line beyond the curbcock **into** the customer's meter."

The last two sentences in the first paragraph on Page 57 of the record reading, "One of the principal reasons we abandoned that line was because it was so deep that we had to spend so much time digging. By laying it shallower, we could maintain it better," should be corrected and supplemented to read, "**It was buried six to nine feet in the ground.** One of the principal reasons we abandoned that line was because it was so deep **it required an awful lot of** time digging. **The principal part of that 500 feet was getting a more shallow line of four inch main in the alley back of those buildings so that we could maintain it better.**"

The fifth sentence of the second paragraph on Page 57 of the record reading, "After we install free service lines we never maintain them after that period," should be corrected so as to read, "After we **installed** free service lines we never **did** maintain them after that period."

Re-Direct Examination.

The last sentence in the redirect examination on Page 58 of the record reading, "In those instances the customers would pay one dollar for the pipe from the curb to one foot from the building, or if in an alley, from the property line to within one foot of the building," should be corrected to read, "In those instances the customer would pay one dollar for the pipe from the curb line **to the end of the company service,** or, if in the alley, from the property line, **they would pay one dollar for the line to be installed** to within one foot of **their** building."

That portion of the record on Page 61 reading as follows is in error:

"Plaintiff reads from Exhibit 1, being Rules and Regulations governing the distribution of gas in Tipton, Missouri, issued by defendant's predecessor and

approved by the Missouri Public Service Commission, being effective on November 1, 1931, and being in force at the time of the installation of the pipes in question. The following is read to the jury from Section 2, Subsection 2 of said Rules and Regulations:"

Thereafter follows the section and subsection referred to. The foregoing statement is incorrect because the Exhibit shows on its face that Section 2, Subsection 2 of the Rules and Regulations in question were not, as stated, in effect on November 1, 1931, and did not become effective until October 1, 1941, or about ten years later (SR 25). In any event later than the last date mentioned in evidence for the installation of the service line involved.

DEFENDANT'S EVIDENCE.

VANSTON H. RYAN, on behalf of defendant, testified (66-73):

Direct Examination.

At the bottom of Page 66 of the record immediately after the phrase "but it would diffuse through those registers," the following sentence should be inserted to supplement the testimony **"It would not stay under the floor. It would diffuse rather rapidly."**

Supplementing the last sentence of the first paragraph at the top of Page 67 of the record ending, "* * * and after that the gas would come out just like it had been put in the pipe," should be amended and changed to read "* * * and after that the gas would come out just like it had been put in the pipe, **including the odorant."**

The second paragraph on Page 67 of the record should be supplemented by inserting after the third sentence reading, "The gas would pass more rapidly through that soil then," the following sentence, **"The soil eventually would act as a pipe for the gas."**

The third paragraph on Page 67 of the record should be supplemented by inserting after the sentence in parenthesis reading "(Objection that the doctor did not have

sufficient facts, including whether or not the building was open or closed, etc.)" the following sentence, **"It would not take six months for an explosive mixture to accumulate in the building."**

The next to the last sentence on Page 67 ending "* * * would reach an explosive mixture and then eventually reach a non-explosive mixture when it went above the explosive range," should be amended so as to read, "* * * would reach an explosive mixture and then eventually reach a non-explosive mixture when it went above the explosive range, **where it would burn."**

The first sentence on Page 68 of the record ending, "* * * that will ignite the gas which is above the explosive range and it will burn," should have inserted immediately thereafter to supplement the testimony the following sentence, **"It would then go back to ignite the source where it would burn."**

The sixth sentence in the second paragraph on Page 68 reading, "To anyone observing a gas explosion he would see a flash," should have inserted immediately thereafter, **"There cannot be a gas explosion without a visible flash of fire."**

The following sentence should be added to the end of the second paragraph on Page 68 of the record, **"This could never occur in as long as three minutes."**

The last paragraph on Page 69 of the record should be amended and corrected by changing the second sentence reading, "Gas is a sharper noise, a blasting effect, and if there had been an explosion there would have been flames," so as to read, "Gas is a sharper noise, a blasting effect, and if there had been an explosion there would have been flames, **which would have been noticed by any casual observer. It does not have any of these earmarks."**

Immediately following the last full sentence at the bottom of Page 69 of the record, the following sentence should be inserted, **"Fire will be observed immediately upon a gas explosion."**

At the top of Page 72 and immediately following the last sentence of the first paragraph ending, "* * * it would burn almost instantaneously with the explosion above because

of the opening," the following sentence should be inserted, **"You cannot have two separate explosions."**

DR. CHARLES LEUBBERT, on behalf of defendant, testified (74-76):

Direct Examination.

At the top of Page 75 of the record the second sentence of the last paragraph of direct examination reading, "That was on the second floor," should be corrected to read, "That was on the second floor **against the east wall of the west building."**

Immediately before the last sentence in that same paragraph on Page 75, the following sentences should be inserted, **"It looked like a torch blaze. We were not able to put it out."**

LONNIE BELL, on behalf of defendant, testified (76-77):

Direct Examination.

The first sentence of the direct examination of this witness on Page 76 of the record reading, "I have lived in Tipton, Missouri, since 1931," should be changed to read, "I have lived in Tipton, Missouri, since **1939."**

The third paragraph of the witness' testimony contains the following comment:

> "* * * (objection sustained to question: 'Did you see where there had been digging done there, as to underneath the ground?')"

which should be changed to read:

> "* * * (objection **overruled** to question: 'Did you see where there had been digging done there, as to underneath the ground?')"

Cross Examination.

At the bottom of Page 76 of the record, immediately after the identification of Exhibit 32, the following sentence should be added, **"I do not know whether the telephone company had moved out of the upstairs part of the building when I moved in."**

At the top of Page 77 of the record the second sentence reads, "That is true." Since the witness did not so testify, this sentence should be deleted from the record.

Immediately following the third sentence at the top of Page 77 of the record reading, "I don't know when the service pipe was put in," the following sentence should be inserted, **"The meter was out there when I moved into the building."**

DEFENDANT'S EXHIBIT 1, PAGE 1.

Rules and Regulations for the Distribution of Gas Service in Tipton, Missouri.

FORM NO. 24

P. S. C. MO. No. 1

Cancelling P. S. C. MO. No. _____

No supplement of this tariff will be issued except for the purpose of cancelling the tariff.

~~Interstate Gas Company~~
~~Central Distributing Company~~
~~Central States Gas Service Company~~

name of corporation or municipality

The Gas Service Co. Case #11058 - May 21, 1947
adoption Notice - Oct. 1, 1947

Rules and Regulations

~~SCHEDULE OF RATES~~

FOR

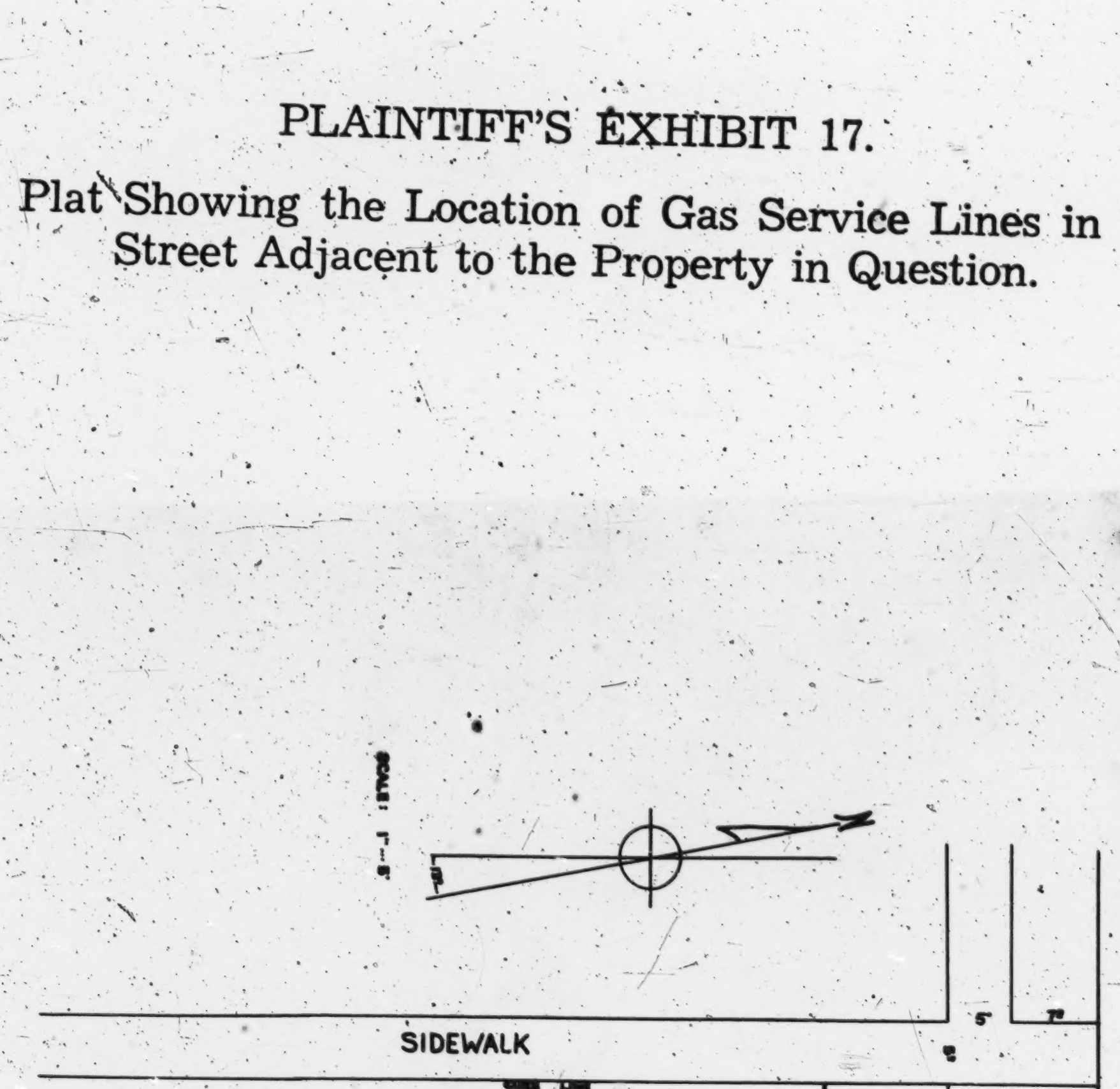
GAS

RECEIVED
NOV. 4, 1931
David P. Janes, Sec.
Public Service Com.

Rules and Regulations
10,366
ce. - Nov. 30, 1943

PLAINTIFF'S EXHIBIT 17.

A Plat Showing the Location of Gas Service Lines in the Street Adjacent to the Property in Question.



Central-Distributing-Company
Central-States-Gas-Utilities-Co.
Interstate Gas Co. Case No. 10,366
Adoption Notice - Nov. 30, 1943
Rules and Regulations

name of corporation or municipality

The Gas Service Co. Case #11058 - May 21, 1947
adoption Notice - Oct. 1, 1947

Rules and Regulations

SCHEDULE OF RATES

FOR

GAS

RECEIVED
NOV. 4, 1931
David P. Janes, Sec.
Public Service Com.

APPLYING TO THE FOLLOWING TERRITORY Belton, Blue Springs, Centerview, Clarksburg, Grandview, Houstonia, Martin City, Palmyra, Pilot Grove, Raytown, Tipton, Windsor
Fayette - Case 8201 - 10/16/32
Hickman Mills - Case 8244 - 11/29/32

FILED
DEC. 21, 1931
By L. H.
PUBLIC SERVICE COM.
OF MO.

ISSUED Aug. 7, 1931
month day year

EFFECTIVE Nov. 1, 1931
month day year

BY sgd. B. N. Bay Vice-Pres.
name of officer title

101 West 11th St., Kansas City, Mo.
address of officer

CANCELLED
JAN 1 1952
By Gas Service Co
PUBLIC SERVICE COM.
OF MO.
P.S.C. MO. NO. 1
Rules and Regulations
See Co's. Dec. 10 1951
Correspondence

DEFENDANT'S EXHIBIT 1, PAGE 4.

FORM NO. 13 P.S.C. MO. No. 1 {Original / Revised} SHEET No. 4 of 13

Cancelling P.S.C. MO. No. {Original / Revised} SHEET No.

Central States Gas Utilities Company
Name of Issuing Corporation or Municipality

For All Towns & Communities Shown on Cover Sheet
Community, Town or City

CANCELLED
JAN 1 1952
By Gas Service Co.
PUBLIC SER. COM.
OF MO.
P.S.C. Mo. No. 1
Rules & Regulations

RULES AND REGULATIONS GOVERNING THE DISTRIBUTION AND SALE OF GAS - Continued.

7. Service Lines. The service line shall be connected to the company line at curb or lot line and shall be constructed, tested and approved in accordance with the rules and regulations established by the company.

8. No Additional Service Lines. No additional tap shall be made, service line laid, or meter set for gas service to a garage, stable or other building on any lot where there already exists a service line to the residence or main building of the customer.

9. Customer Responsible for Maintenance of Lines. All service and house lines from the curb or lot line shall be kept and maintained in good condition by the customer or owner. When leaky or hazardous conditions of the service or house lines are found, repairs shall be made promptly by the customer or owner.

10. No customer Shall Sell to Another. The company will furnish each customer with a meter, which shall be and remain property of the company and the customer shall not supply or sell gas delivered through his meter for use in any premises not served by such meter according to the records of the company covering such meter installation..

11. Service From High Pressure Mains. When the company has no low or

line at curb or lot line and shall be constructed, tested and approved in accordance with the rules and regulations established by the company.

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11. Service From High Pressure Mains. When the company has no low or intermediate pressure mains available and it is desired to supply a customer from a high pressure line, the customer shall, at his own expense, provide suitable regulator or regulators, for reducing the pressure from high pressure line to the pressure of utilization. The customer shall also arrange to have such regulator or regulators installed in accordance with the plans furnished by the company, and shall pay all expenses incident to such installation. Regulators and meters set in accordance with the company's approved plans must be located immediately adjacent to the company's main line. The customer shall, at his own expense, provide suitable substantial covering for regulators and meters, so that they may be protected from the weather and from disturbances by animals running loose on the premises. The customer shall maintain such regulator or regulators in good repair and in proper condition at all times. The company shall provide and install suitable pressure-tight safety device to be connected on the outlet of meter at the expense of the customer, to protect customer's service from excessive pressures.

12. Precautions to be Taken by Customers. A customer shall take due care to prevent any waste of gas. In case of detection of a leak within his premises, the customer shall immediately shut off the gas at the meter, extinguish all light flames, or fires within the premises, open all doors and windows to permit the escape of gas, at once notify the company by

DEFENDANT'S EXHIBIT 1, PAGE 7.

FORM No. 13 P.S.C. MO. No. 1 1st {Original / Revised} SHEET No. 7

Canceling P.S.C. MO. No. 1 {Original / Revised} SHEET No. 7

Central Distributing Company
Name of Operating Corporation or Municipality

For All Towns & Communities shown on Cover Sheet
Community, Town or City

RECEIVED
AUG. 30'41
MISSOURI
Pub.Serv.Com.

RULES AND REGULATIONS GOVERNING THE DISTRIBUTION AND SALE OF GAS - Continued

Section II - Physical Property.

For the purpose of setting forth the conditions necessary for adequacy and safety of gas service and supply, the company makes effective the following rules and regulations governing the installation of service lines, piping, installations and connections, by any plumber, gas fitter, patron, customer or owner requiring gas service from the company, and the owner will be responsible for compliance with such rules and regulations as the physical conditions require before service may be obtained from the company.

1. Application for Service. Application for gas service connection shall be filed with the company before tap will be made or meter supplied.

2. Service Lines. The service line shall be of standard weight pipe of a size to be determined by the company but in no case less than 1 ¼" and shall be connected to the company line at curb or lot line with a Dresser type coupling, which shall be equal in design and workmanship to those produced by the S. R. Dresser Co. Service line shall preferably be installed in a straight line at right angles to the front or rear property line. Where conditions do not permit this, only ninety degree (90 degree) turns shall be used so that all portions of the service line will be either parallel to or at right angles to the front or rear property line. The service line from property line to meter location shall be part of the property and shall be installed and maintained at the property owner's expense, but its use as a gas service line will be subject to the [illegible] and the approval of the company. The owner may have such line

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Each building served with gas shall have a separate service line. A service run to a building having more than one meter shall branch into individual services outside the foundation wall, each service being equipped with a stop cock. These cocks shall be placed in the service lines immediately outside the foundation wall, if accessable, so located that the flat head of the core shall be parallel to the street when in the "off" position. In case a meter room is available, however, the service shall enter the foundation wall and branch inside the meter room, a single stop cock being installed at curb or property line. In the latter case the company shall furnish the master cock and box.

FILED
SEP. 27, 1941
Public Service Commission

CANCELLED
JAN 1, 1952
By Gas Service Co.
P.S.C. Mo. No. 1
Rules & Regulations
PUBLIC SERV. COM. OF MO.

DATE OF ISSUE August 20, 1941 (month day year) DATE EFFECTIVE Oct. 1, 1941 (month day year)

ISSUED BY Sgd. Wallace Gilrey (name of officer) President (title) (address)

BOONVILLE PRINTING CO.

DEFENDANT'S EXHIBIT 1, PAGE 9.

FORM NO. 10 P.S.C. MO. No. 1 {Original / Revised} SHEET No. 9 68-69

Cancelling P.S.C. MO. No. ____ {Original / Revised} SHEET No. ____

Central States Gas Utilities Company
Name of Issuing Corporation or Municipality

For All Towns & Communities Shown on Cover Sheet
Community, Town or City

RULES AND REGULATIONS GOVERNING THE DISTRIBUTION AND SALE OF GAS - Continued.

6. Owners Shall Maintain Own Lines Satisfactorily. All service and house lines and fixtures from the curb or lot line installed at the expense of the owner or customer shall be kept and maintained in condition satisfactory to the company. When inspected and found in leaky or hazardous condition the gas will be shut off until repairs are made.

7. Size of House Piping. The minimum in size and maximum in length of house piping shall be governed by the number of 3/4" openings to be supplied, as follows:

Number of 3/4" Openings	Feet of Pipe Permitted				
	3/4 In.	1 In.	1¼ In.	1½ In.	2 In.
1	40	75	100	150	200
2	20	70	100	150	200
3	10	40	100	150	200
4		25	65	150	200
5		20	45	115	200
6			35	80	200
7			25	60	200
8			20	45	200
9				35	160
10				25	120
12				20	90
15					65

CANCELLED
JAN 1, 1952
By Gas Service Co.
PUBLIC SERVICE COM.
OF MO.
P.S.C. MO. NO. 1
Rules & Regulations

6. Owners Shall Maintain Own Lines Satisfactorily. All service and house lines and fixtures from the curb or lot line installed at the expense of the owner or customer shall be kept and maintained in condition satisfactory to the company. When inspected and found in leaky or hazardous condition the gas will be shut off until repairs are made.

7. Size of House Piping. The minimum in size and maximum in length of house piping shall be governed by the number of 3/4" openings to be supplied, as follows:

Number of 3/4" Openings	Feet of Pipe Permitted				
	3/4 In.	1 In.	1¼ In.	1½ In.	2 In.
1	40	75	100	150	200
2	20	70	100	150	200
3	10	40	100	150	200
4		25	65	150	200
5		20	45	115	200
6			35	80	200
7			25	60	200
8			20	45	200
9				35	160
10				25	120
12				20	90
15					65
20					35
25					20

CANCELLED
JAN 1, 1952
By Gas Service Co.
PUBLIC SERVICE COM.
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P.S.C. MO. NO. 1
Rules & Regulations

Opening left in house piping for furnace connection shall not be less than 1 1/4".

Each 1 in. opening shall be counted as two (2) 3/4 in. openings.
Each 1¼ in. opening shall be counted as three (3) 3/4 in. openings.
Each 1½ in. opening shall be counted as four (4) 3/4 in. openings.
Each 2 in. opening shall be counted as seven (7) 3/4 in. openings.

No piping or opening smaller than 3/4" shall be allowed for any purpose except for mantels, grates, small heating appliances (for heating space not to exceed 1,728 cubic feet), and for bunsen type burners as used by doctors, dentists and laboratories. Twenty (20) feet of 1/2" pipe may be run for one such opening and two (2) 1/2" openings shall be considered equivalent to one (1) 3/4" opening. For piping installed to supply hotel,

DATE OF ISSUE Aug. 7, 1931 (month, day, year) DATE EFFECTIVE Nov. 1, 1931 (month, day, year)

ISSUED BY Sgen. B. N. Bay, Vice Pres. 101 West 11th Street, Kansas City, Mo. (name of officer, title, address)

REGISTER PRINTING CO.

Pltf's Ex. 2
9-1-56 HB.

17

MONITEAU STREET

SIDEWALK

SIDEWALK

46'

MOREAU STREET

SIDEWALK

FACTORY BLDG.

CONCRETE PATCH

NEW BLDG LINE

FILED

EARL R. PRIEGEL
L.S. 36

PLAINTIFFS' EXHIBIT 23, PAGE 2.

Deed Dated November 9, 1942, for the West Twenty-Two Feet, or the Hilgert Building.

TO HAVE AND TO HOLD the premises aforesaid, with all and singular the rights, privileges, appurtenances and immunities thereto belonging or in anywise appertaining, unto the said part Y of the second part, and unto his heirs and assigns, forever; the said

--Grantor--

hereby covenanting that he is lawfully seized of an indefeasible estate in fee in the premises herein conveyed; that he ha s good right to convey the same; that the said premises are free and clear of any incumbrances done or suffered by him or those under whom he claim, and that he will WARRANT AND DEFEND the title of the said premises unto the said part Y of the second part, and unto his heirs and assigns forever, against the lawful claims and demands of all persons whomsoever.

Except taxes assessed for and due in year 1943 and thereafter.

Subject to rightsof United Telephone Co. in a lease ~~xxxxxxxxxx~~ on part of said real estate, if any.

thereafter.

Subject to rights of United Telephone Co. in a lease ~~xxxxxxxxxx~~ on part of said real estate, if any.

In Witness Whereof, The said party of the first part has hereunto set his hand and seal the day and year first above written.

J. W. Hilgert (SEAL)

(SEAL)

(SEAL)

(SEAL)

(SEAL)

(SEAL)

(SEAL)

(SEAL)

(SEAL)

(SEAL)

(SEAL)

(SEAL)

Signed, Sealed and Delivered in Presence of Us:

LIBRARY
SUPREME COURT, U.S.

FILED
SEP 24 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

Nos. 501

NAOMI WOOD,
Petitioner,

vs.

THE GAS SERVICE COMPANY,
Respondent.

ALFRED F. MARTIN,
Petitioner,

vs.

THE GAS SERVICE COMPANY,
Respondent.

BILTWELL COMPANY, INC., TIPTON MANUFACTURING CO., GLENRIDGE TROUSERS COMPANY, and EMBASSY MANUFACTURING COMPANY, *Petitioners,*

vs.

THE GAS SERVICE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE EIGHTH CIRCUIT.

WILLIAM S. HOGSETT,
HALE HOUTS,
ALVIN C. RANDALL,
J. D. JAMES,
1122 Rialto Building,
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vs.
THE GAS SERVICE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE EIGHTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court to review the judgment of the United States Court of Ap-

peals for the Eighth Circuit, entered in this cause on May 6, 1957.

OPINIONS BELOW.

The opinion of the Court of Appeals per Donovan, District Judge, is reported in 245 F.2d 653, appears in the record on certiorari at Pages 1 to 8[1] and is appended hereto (*infra*, pp. A1-8). On motion for rehearing a majority opinion, per Donovan, District Judge, and a dissenting opinion, per Gardner, Chief Judge, were rendered (CR 31-41) (245 F.2d l.c. 658), and are also appended hereto (*infra*, pp. A9-19).

STATEMENT OF JURISDICTION.

The judgment sought to be reviewed was dated May 6, 1957, and entered that day (CR 9). The Petition for Rehearing was denied on July 11, 1957 (CR 43). The request for consideration by the Court *en banc* was denied on July 31, 1957 (CR 53), and on the same day an Order was entered by the Court staying the issuance of mandates for thirty days from that date, pending Petition for Certiorari (CR 55). On August 21, 1957, an Order was entered by the Court staying the issuance of mandates for thirty days from August 30, 1957, pending Petition for Certiorari (CR 59).

The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254(1).

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[1]The pages of the certified record on certiorari, which will be hereinafter referred to as "CR," have been numbered consecutively in ink commencing with the opinion of the Court of Appeals.

The pages of the certified copy of the record printed for use in the Court of Appeals, hereinafter referred to as "R," remain numbered as they were in that court.

QUESTIONS PRESENTED FOR REVIEW.

I.

Did the Court of Appeals decide an important state question in a way in conflict with the applicable state law

First. In ruling that the defendant[2] Gas Company had no duty to inspect or inquire into the condition of a gas service pipe despite having knowledge of facts or circumstances that would cause a reasonably prudent person so situated to investigate.

Second. In ruling that the defective pipe in question was as a matter of law owned by the customer?

II.

Did the Court of Appeals refuse to consider the controlling decisions of the Supreme Court of Missouri on the questions involved, and, instead, accept the views of the trial judge, and thus deprive plaintiffs of their right of review and so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

STATEMENT OF THE CASE.

These are actions in which the plaintiffs sued the defendant for amounts aggregating $182,350 for damages sustained by citizens of Missouri in the business district of Tipton, Missouri, from a gas explosion and ensuing fire caused by a leaking gas pipe (R 1-3).[3] The basis for

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[2]For convenience Petitioners will be referred to as plaintiffs and Respondent as defendant.

[3]Three separate cases growing out of the same casualty were filed. The issues as to liability being the same in all cases, they were consolidated by the trial court (R 8-9).

Federal jurisdiction in the court of first instance was diversity of citizenship, under Title 28, USC, Sections 1332 and 1441.

Plaintiffs pleaded and tried their case on two theories of negligence, to-wit, (1) that the defendant failed to inspect, test and maintain in a safe condition pipes which it owned or controlled, and (2) that the defendant (regardless of who owned the pipe) negligently failed to investigate for a leak and either repair it or notify the customer and give him an opportunity to repair it after it had knowledge of facts that would put a reasonably prudent person handling gas on inquiry (R 1-3, 64).

The Evidence.

In the early morning of January 31, 1955, there was an explosion and fire which largely demolished a building owned by plaintiff Martin, and destroyed personal property belonging to the other plaintiffs (R 15, 19-22, 113, 119, 123, 125). Experts on both sides agreed that the casualty was caused by a gas explosion (R 39, 47, 69-70). A leaking gas service pipe, with a hole in it more than one inch in diameter, was discovered near the building by defendant's employees shortly after the fire (R 52, 59).

As to Knowledge of Facts Putting on Inquiry.

The pipe in question was generally corroded and the leak was caused by gradual corrosion over the years (R 38, 46, 53). It was an old pipe, having been installed more than 20 years before (R 18, 32). In 1950 and 1951 the defendant had had to replace 659 feet of pipe which was connected with and immediately adjacent to the pipe in question (Exhibit 17, Supplemental Record 33) (R 53-54, 59, 63, 131) because, according to the defendant's own superintendent, it had been "pestered repeatedly" by leaks, the "pipe was eaten up," and was so generally corroded

as to be unfit for use (R 54). The defendant knew that the pipe that caused the plaintiffs' damage was laid at approximately the same time as the 659 feet of pipe that had been found unfit for use (R 18, 32, 56, 57, 79).

Despite these facts, the defendant never tested the pipe in question prior to the fire and never warned the customer, Martin, of having found 659 feet of pipe, of the same approximate age and in the same approximate place as the faulty pipe, in such an advanced state of deterioration that it had to be replaced (R 56, 59-60). Martin was unaware of any of these facts (R 24, 25-26, 59-60).

When the pipe which caused the casualty was dug up and inspected by defendant *after the fire* it was found to be in the same general corroded condition as the pipe that had been removed in 1950 and 1951, except that it had a bigger hole in it than the holes in the latter pipe (R 53, 54).

When the case was submitted, the court twice instructed the jury that there was no duty on defendant "to make any physical inspection of that line to determine whether any gas was actually leaking from the line prior to [the fire]" (R 87, 99), and refused plaintiffs' request to instruct the jury that "knowledge does not necessarily mean positive information of an unsafe pipe brought directly home to the defendant, but includes knowledge of facts or circumstances that would cause a reasonably prudent person so situated to investigate, where a reasonable investigation would disclose the presence of an unsafe pipe" (R 83). Plaintiffs duly objected (R 95-98). These rulings were approved by the Court of Appeals (CR 9).

As to Ownership and Control.

The leaking service pipe lay outside the property line of customer Martin and in the public street, being under

the portion of the street used as a sidewalk (R 13-14, 24, 59) (Exhibit 17, Supplemental Record 33).

The defendant, and its predecessor which owned the system when the pipe in question was installed, had the franchise right to install, maintain and operate gas lines along all streets and public ways in Tipton (R 61, 62-63).

There was no direct evidence as to who installed the pipe, but was evidence from which the jury could find that it was installed by the defendant's predecessor (R 18-19, 32-33, 49-50), and no evidence that anyone else installed it.

The defective pipe in question, which was 10 feet in length, was in fact exclusively controlled and used by the defendant. It lay between a meter and stop cock on the downstream side and a curb cock on the upstream side, which were owned and exclusively controlled by defendant. Access to the meter and cocks was necessary in order to test that pipe for leaks; and thus the defendant and it alone had the right and ability to control the pipe and the flow of gas into it, and to test the pipe for leaks (R 50, 51-52, 53, 63).

When the leaking pipe was discovered by defendant shortly after the fire it immediately took charge of the pipe, dug it up and removed it to its headquarters in Fayette, Missouri, without consulting Martin (R 24, 52).

At the close of plaintiff's evidence the trial court ruled as a matter of law that Martin owned the pipe and eliminated the theory of plaintiffs based on ownership or control in the defendant (R 63-66). The Court of Appeals affirmed this ruling (CR 9).

REASONS FOR ALLOWANCE OF THE WRIT.

I.

The Court of Appeals Decided an Important State Question in a Way in Conflict with the Applicable State Law.

First. The Trial Court instructed the jury in effect that *the defendant under no circumstances had any duty to make any inspection or inquiry as to the condition of the pipe in question absent actual, direct knowledge of the leak,*[4] and

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[4]The instruction was quite long and repetitious. Paraphrasing for the sake of brevity, the jury was told that *there was no duty on the part of defendant to make any physical inspection of the pipe for leaks prior to the fire; that no duty would arise until defendant had some knowledge of the leakage of gas from that particular service line, or notice of a defect in said line which would imminently cause gas to leak* (R. 87); that only if defendant knew, or by the exercise of ordinary care could have known, that there were defects which made the service line imminently dangerous and unsafe would there be any duty (R. 88); that "imminent" did not mean uncertain or wholly avoidable danger, or a contingent possibility (R. 88); that defendant did not have to know *the location and size of the leak,* but had to have knowledge of facts and circumstances sufficiently pertinent in character to enable a reasonably cautious and prudent person *to take notice that there was a leak* (R. 88); only after notice to defendant of the present leak of gas or of surrounding facts and circumstances that gas would *immediately leak* therefrom would defendant be required to act in relation to the service line in question (R. 88-89); that the defendant would be required to act if it had knowledge of surrounding facts and circumstances which would *lead it to know* that there was imminent danger, but that defendant was not required to act if there were no facts revealed to the defendant from which it would *have knowledge or notice* that there was imminent danger of a leak (R. 89-90); that *there was no duty to make any physical inspection of that line to see whether it was leaking prior to the fire* (R. 99); that defendant's duty would arise only after it *knew of the leaking gas,* or knew of surrounding facts and circumstances which would *lead it to know* that a defect existed (R. 99-100); if defendant did not have knowledge of any actual escaping gas from the line, and if it knew of no surrounding facts and circumstances *leading it to notice any defect,* there was no duty to do anything with reference to the line (R. 101).

refused to instruct the jury that "knowledge" included knowledge of facts putting a reasonably prudent person on inquiry (R. 83). Plaintiffs duly objected (R. 95-98).

The Court of Appeals decision affirming this ruling conflicts with the controlling state law as announced in *Golden* v. *National Utilities Co.*, 356 Mo. 84, 201 S.W.2d 292, 297; *Messmer* v. *St. Louis County Gas Co.*, Mo. App., 42 S.W.2d 963, 965; and *Barrickman* v. *National Utilities Co.*, Mo. App., 191 S.W.2d 265, 268.

In the Golden case the Missouri Supreme Court held (201 S.W.2d l.c. 297) that facts like those here put the gas company "on guard and inquiry * * * and *such facts of themselves constitute sufficient notice.*"[5] The following statement of the rule was quoted with approval (l.c. 297):

> "* * * notice of facts which would lead an ordinarily prudent man to make an examination which, if made, would disclose the existence of other facts is sufficient notice of such other facts * * * and *where a situation suggests investigation and inspection in order that its dangers may fully appear, the duty to make such investigation and inspection is imposed by law* * * *" (Italics the Court's).

Differing with the majority on the motion for rehearing in the case at bar, Gardner, C. J., in a strong dissenting opinion held that the majority decision was contrary to the "controlling state law of Missouri" as announced in the Golden case, saying (*infra*, pp. A15, A17):

> "It is again to be observed that the defendant had actual notice of the corroded and leaking condition of the pipes which it had removed in the immediate vicinity of this property. It had notice of the length of time that these pipes were in the ground and it also had knowledge of the length of time the service pipe here involved, which was part of its system, had been in

[5] All italics in quotes are ours unless otherwise designated.

the ground, and the question as to whether or not this knowledge was not such as to put it on inquiry should not have been taken from the jury, and our own decisions, notably Gas Service Co. v. Helmers, 8 Cir., 179 F.2d 101, and Gas Service Co. v. Payton, 8 Cir., 180 F.2d 505, both handed down subsequent to the Skelly case, review the decisions of the Supreme Court of Missouri and clearly indicate that this court has accepted and followed the teaching of the Golden case as the applicable controlling state law of Missouri. * * *"

"I think the requested instruction properly stated the applicable law and the refusal to give it was prejudicial error. I think the court was also in error in giving the above quoted instruction to the effect that defendant had no duty to make any inspection of the line in question prior to the time of the occurrence in question, and it was likewise error to take from the consideration of the jury the circumstance that defendant had removed from its system pipes in the immediate vicinity of the property in question found to be corroded and leaking.

"Manifestly, there is no dearth of authority in the decisions of the Supreme Court of Missouri on the questions here involved. Nevertheless, the court in its decision did not consider these controlling authorities but instead accepted the views of the trial judge—thus, in effect, depriving appellants of their right of review by this court."

Second. In affirming the action of the trial court in taking the question of ownership and control from the jury and ruling as a matter of law that the bad pipe was owned by Martin, the Court of Appeals decision conflicts with the controlling state law as announced in *O'Malley* v. *Heman Construction Co.*, 255 Mo. 386, 164 S.W. 565, 566; *Ross* v. *Pendergast*, 353 Mo. 300, 182 S.W.2d 307, 309; *Gregg* v. *Page*, Mo. App., 257 S.W.2d 161, 163; and *National Cypress Pole and Piling Co.* v. *Hemphill Lumber Co.*, 325 Mo. 807, 31 S.W.2d 1059, 1063, which hold that ownership is a *jury* issue, that

possession and control of property raise a presumption of ownership, and that control is possession.

The Court of Appeals opinion affirming the judgment did not mention the ownership point at all (*infra*, pp. A2-8). In its opinion on the motion for rehearing the Court merely adopted the Trial Court's view that, despite substantial evidence of ownership and control in the defendant, the customer owned the pipe in the street *because he owned the land to the center of the street* subject to the easement of the city (*infra*, pp. A10-11). The fact of ownership of the land to the center of the street could not of itself, of course, make the abutting lot owner the owner of *the pipe*. If it did, the defendant would not even own its mains that are installed in streets. The Court of Appeals ignored the fact that defendant's franchise right to put *its* pipe in all streets of Tipton, was paramount to that of the abutting owner (R 61-63).[6]

This point was thus stated by Judge Gardner in his dissenting opinion (*infra*, pp. A11-13, A19):

> "The leaking service pipe from which the gas causing the explosion escaped was not located on the plaintiffs' private property but was located in the public street, or at least the jury on the undisputed evidence could have so found. The service pipe here involved was installed under the supervision of and by the employees of defendant's predecessor in 1932 or 1933 and was part of its system. The undisputed evidence showed that the defendant by reason of its franchise installed, maintained and controlled its main lines and all such service gas lines as were located in the public street, and that it and it alone had the right to control or the

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[6] In the original opinion the Court stated that the service line from *property line* to meter belongs to the customer and is maintained by him (p. A3), but neglected to mention that the pipe which caused this explosion was *not* between the property line and meter, but was entirely *outside* the property line under the undisputed evidence (R. 13-14, 24, 59) (Exhibit 17, Supplemental Record 33).

facilities to repair or inspect the same. * * * It also appears that subsequent to the explosion in the instant case the defendant without permission of the property owner removed that portion of the service pipe from which the gas causing the explosion escaped.

* * *

"[The Court's] instruction manifestly assumed that the service pipe here involved was on plaintiffs' private property * * * In the instant case, the defendant, as has been observed, under its franchise maintained a system of gas lines through which it transported its gas to consumers and this system included service lines and it had the exclusive right to maintain, inspect and control these lines, at least up to the property lines of the consumers. *It, and not the plaintiffs, had all the attributes of ownership of its system of lines lying in the public street through which it transported its gas to consumers.*

* * * *

"I conclude that plaintiffs have not had a fair trial in this case and that on appeal *this court has erroneously interpreted the applicable law of Missouri* * * *".

In thus ruling contrary to the law of Missouri, the Court of Appeals contravened the requirement of this Court in *Erie* v. *Tompkins*, 304 U.S. 64, and of Congress in 28 U.S.C., Section 1652, that federal courts apply the state law in diversity cases.

It is common knowledge that gas is in wide use nowadays for heating homes as well as all other kinds of buildings, and is a commodity that is highly dangerous, both to life and property. Defendant, who carries on widespread operations in Missouri, is a citizen of a state other than Missouri and habitually removes to the Federal Court all suits brought against it by citizens of Missouri for more

than $3,000.00.[7] The question of the duty of defendant, and other distributors of gas, is an important question of state law, and if the Federal Courts exact a lesser duty than that imposed by the law of Missouri, diversity litigants will be deprived of important rights given them by the Missouri law.

Indisputably, an important state question is involved, and the conflict between the Court of Appeals decision and the state law ought to be resolved by this Court (Rule 19, 1 (b) of this Court).

II.

Plaintiffs Were Deprived of Their Right of Review.

There are special and important reasons for granting certiorari here which transcend the interests of the particular parties, and affect all litigants who are entitled to a right of review and to an application of the rule of *Erie* v. *Tompkins, supra*, to that review.

The Court of Appeals accepted the views of the trial court without making any independent investigation of the Missouri law. In short, there was a clear abdication by that court of its lawful duty and function as a court of review. This is apparent on the face of the opinion.

The points in issue on appeal (notice, ownership, and the exclusion of material evidence) were not even mentioned in the opinion, let alone discussed, and not a word was said about what the Missouri law on those points was. Not a single Missouri case was mentioned, although con-

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[7]There is not a single reported Missouri decision in which the defendant is a party; on the contrary every reported decision is a Federal Court decision. *Gas Service Co.* v. *Payton*, 8 Cir., 180 F.2d 505; *Gas Service Co.* v. *Helmers*, 8 Cir., 179 F.2d 101; *Gas Service Co.* v. *London & Lancashire Ins. Co.*, 188 F.2d 404; *Wilson* v. *Gas Service Co.*, 95 Fed. Supp. 1022; *Sunday* v. *Gas Service Co.*, D.C., W.D. of Mo., 10 F.R.D. 185; *Wesner* v. *Gas Service Co.*, D.C., W.D. of Mo., 45 Fed. Supp. 645.

trolling Missouri decisions had been cited in plaintiffs' brief. The opinion relied only upon an abstract statement of general principles (not pertinent to the issues on appeal) in the Federal case of *Skelly Oil Co. v. Holloway*, 8 Cir., 171 F.2d 670 (a case which, on its facts, was not remotely in point[8]).

The Court's opinion did nothing more than quote the abstract language from the Skelly case, follow it with a long quotation from the trial court's charge, and conclude that the plaintiffs did not sustain the "heavy" burden of proving the trial court wrong (*infra*, pp. A2-8).

Judge Gardner, although he joined in the decision of the Court of Appeals at first, recognized on motion for rehearing that the Court had deprived plaintiffs of their right of review, and in unmistakable language said (*infra*, pp. A12, A17).

> "In their petition for rehearing plaintiffs sharply call to our attention certain decisions of the Supreme Court of Missouri which they assert have been overlooked both by the trial court and this court in determining the issues in this case and it is also claimed that * * * without independently examining the law of the state of Missouri to ascertain whether there was any law or whether the state law was doubtful on the issue involved we have accepted the views of the learned trial judge.
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> * * *

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[8]Judge Gardner said: "The opinion relies largely on what is said by this court in *Skelly Oil Co.* v. *Holloway*, 8 Cir., 171 F.2d 670, as stating the applicable law. In that case the service pipe was located wholly upon privately owned property and the case did not involve the question here involved, whether the defendant should be charged with notice because of surrounding facts and circumstances such as are present in the instant case. It is worthy of note, too, that the opinion in the Skelly case makes no mention of *Golden* v. *National Utilities Co.*, Mo., 201 S.W.2d 292, and it was not called to the attention of the court although it was handed down a short time before the opinion of this court" (*infra*, pp. A12-A13).

> "Manifestly, there is no dearth of authority in the decisions of the Supreme Court of Missouri on the questions here involved. Nevertheless, the court in its decision *did not consider these controlling authorities but instead accepted the views of the trial judge—thus, in effect, depriving appellants of their right of review by this court.*"

This from a judge who, having originally joined in the decision, had first-hand knowledge of the extent of the deliberations that preceded it.

The opinion *professes* to consider the state law. However, where, as here, not one of the several state cases in point is cited or discussed; where, as here, there is no mention of the specific issues on appeal, and no discussion of the state law pertinent thereto; where, as here, a member of the court joining in the opinion admits that state law was not considered; and where, as here, the holding is clearly contrary to the controlling state law, the conclusion that the court did not itself examine the state law is inescapable, the opinion's *ipse dixit* to the contrary notwithstanding.

The Court of Appeals did more than merely reach a *result* violative of controlling state decisions; the *method* by which that result was reached violated the plain injunction of this Court in *Erie* v. *Tompkins*, 304 U.S. 64, and of Congress in Title 28, U.S.C., Section 1652. Certiorari is not here sought just because a federal court has *mis*interpreted and *mis*applied the Missouri law. It is sought also because the Court of Appeals has in effect *refused* to interpret and apply the state law.

This Court has readily granted certiorari where a federal court has ignored the decisions of the intermediate state tribunals (*Fidelity Trust Co.* v. *Field*, 311 U.S. 169, 179; *Six Companies* v. *Highway Dist.*, 311 U.S. 180; *Stoner* v.

New York Life Ins. Co., 311 U.S. 464), has granted certiorari to insure that the federal courts "ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear * * *" (*West* v. *A. T. & T. Co.*, 311 U.S. 223, 237), and has said that state decisions must be followed rather than prior federal decisions (*Fairfield* v. *County of Gallatin*, 100 U.S. 47). It necessarily follows that certiorari should be granted where a federal court has ignored the *entire body* of applicable state law on the issues, as was done here.

The rule of *Erie* v. *Tompkins* means nothing unless federal courts are required actually to follow it—*saying* they are following it is not enough.[9] If *ostensible* compliance be permitted to replace actual compliance, the rule of decision prescribed by *Erie* v. *Tompkins* and 28 USC 1652 will become a rule of form rather than substance, and the conflicts, uncertainties and confusion that *Erie* v. *Tompkins* was designed to correct will be perpetuated. The reasons for granting certiorari in the case of *Erie* v. *Tompkins* apply with equal force to the case at bar.

The Court of Appeals sought to justify acceptance of the trial court's views by the "rule of deference" device; but that has no application here. A federal trial court's interpretation of the state law will be deferred to *only* where the state law on the subject is silent or in doubt (*MacGregor* v. *State Mutual Life Assurance Co.*, 315 U.S. 280, 281; *Milwaukee Insurance Co.* v. *Kogen*, 8 Cir., 240 F.2d 613, 615), and *only* after the fact of silence or doubt has been determined by an independent study of the state law by the appellate court (*Thompson* v. *Consolidated Gas Co.*, 300 U.S. 55, 74-75). Neither prerequisite obtains here.

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[9] In every case we are able to find, where certiorari was granted for failure to apply the state law, the lower federal court *professed* to comply with the rule of *Erie* v. *Tompkins*. See, for example, *Fidelity Trust Co.* v. *Field*, 311 U.S. 169, 177.

The unwarranted abdication by the Court of Appeals of its judicial function to afford a review was such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision (Rule 19, 1(b) of this Court).

CONCLUSION.

It is respectfully submitted that the petition should be granted, and the Writ issue.

WILLIAM S. HOGSETT,
HALE HOUTS,
ALVIN C. RANDALL,
J. D. JAMES,
Counsel for Petitioners.

APPENDIX A.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,698.

Naomi Wood, Appellant,
vs.
The Gas Service Company, Appellee.

Appeal from the United States District Court for the Western District of Missouri.

No. 15,699.

Alfred F. Martin, Appellant,
vs.
The Gas Service Company, Appellee.

Appeal from the United States District Court for the Western District of Missouri.

No. 15,700.

Biltwell Company, Inc., Tipton Manufacturing Company, Glenridge Trousers Company, and Embassy Manufacturing Company, Appellants,
vs.
The Gas Service Company, Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[May 6, 1957.]

Alvin C. Randall (J. D. James, Thad C. McCanse, and Hogsett, Houts, James, Randall & Hogsett were with him on the brief) for Appellants.

Don M. Jackson (Charles M. Miller, Jerry T. Duggan, and Rogers, Field, Gentry & Jackson were with him on the brief), for Appellee.

Before GARDNER, Chief Judge, JOHNSEN, Circuit Judge, and DONOVAN, District Judge.

DONOVAN, District Judge.

These three appeals are from judgments for the appellee. The three cases were consolidated for trial in the district court. Appellants will be referred to as plaintiffs and appellee as defendant, as they appeared in the trial court.

Plaintiffs commenced these actions to recover for property damage, which they attribute to the negligence of the defendant. Verdicts were returned for the defendant. The record shows a factual situation leading to a violent explosion and fire traceable to escaping gas sold and delivered by defendant to the public, among whom were the plaintiffs who occupied the damaged premises in the central business district of Tipton, Missouri. The explosion occurred at about 2:15 to 2:30 a. m. on January 31, 1955. Fire was immediately observed in the building owned by plaintiff Martin and leased in part to the other plaintiffs.

Defendant subsequently dispatched employees to the site of the explosion and fire, and the pipe suspected of leakage was removed by them about 10:30 a. m. on February 2, 1955. Prior to removal it had been underground and connected to an elbow that had an oval-shaped hole

in it, which measured about one and three-fourths by one inch in area. Part of the main pipes had been replaced in July, 1951. Plaintiffs disclaim knowledge of this replacement, and plaintiff Martin testified the pipe was removed without his permission. It was defendant's policy to make checks periodically to find leaks in its mains, by driving a bar down to the pipe and lowering a gas indicator into the hole. Defendant would not check the service lines from the curbcock to the meter on the owner's premises without permission from the owner or proprietor. The service line from property line to meter is part of the customer's property and is installed and maintained at the property owner's expense.

No one had smelled the gas in the building before the explosion. There is no dispute as to cause and effect. An explosion and resulting fire led to the damage. What initiated the cause?

Contending defendant's negligence was the cause, plaintiffs claim the proximate cause was (a) defendant's permitting the escape of gas from a pipe which was not maintained in a safe condition; (b) defendant's failure to shut off the flow of gas in time to avoid the explosion, and (c) defendant's failure to warn the plaintiffs. Plaintiffs, by pleading and evidence, theorized that defendant owned the defective pipe and had knowledge of its defective condition, which fact was not imparted to the plaintiffs. Defendant contends plaintiff Martin owned the pipe in question and that it had no duty of inspection in that respect.

In this diversity case the substantive law of Missouri must be applied. The rule in Missouri is:

> "* * * that in view of the highly dangerous character of the gas and its tendency to escape, a distrib-

utor of gas to the public must use a degree of care in the installation and maintenance of conduits and appliances under its control commensurate with the danger or risk which it is its duty to avoid; that is to say, that one distributing gas to the public must exercise ordinary care, under the circumstances attending its operations, to maintain its facilities in a reasonably safe condition, and not that the distributor is liable as an insurer. Under the laws of Missouri, in the absence of a contract so requiring, a distributor of gas is not charged with the duty of inspecting or maintaining privately owned service pipes or appliances in the buildings or on the property of its customers. On receipt of notice from a customer of defects in the customer's service installations, the gas distributor may discharge the duty which the law imposes upon it by shutting off the supply of gas until such time as the owner of the defective pipes or appliances may have corrected the defects in them. But, if the distributor on receipt of such notice from a customer undertakes to inspect the service installation on the property of the customer and to discover and correct the leaks or other defects permitting the escape of gas on the owner's premises, the distributor is obligated to exercise a degree of care commensurate with the known dangerous character of gas to discover and repair the defects in the customer's installations.

* * *

"The mere statement of the evidence shows how difficult it is for an appellate court to appraise it fairly from the printed record, and how important, if not decisive, in such an appraisal was the opportunity which the trial court had to hear and observe the witnesses on the stand. Obviously, the trial court might have resolved the issues of fact in favor of defendant. But we cannot say that the opposite conclusion is without substantial basis in the evidence or that upon a consideration of all of the evidence it is clearly erroneous."

Skelly Oil Co. v. *Holloway et al.*, 8 Cir., 171 F.2d 670, 674, 679. See also *Gas Service Co.* v. *Helmers*, 8 Cir., 179 F.2d 101; *Gas Service Co.* v. *Payton*, 8 Cir., 180 F.2d 505.

The learned trial court, in appropriate and meticulous manner, charged the jury in keeping with Missouri law as outlined in the foregoing cases, as follows:

> "You must keep in mind one rule of law, that it was the duty of the defendant's agents and employees to exercise a high degree of care commensurate with the deadly and dangerous character of the product, natural gas, handled and distributed by them. That is to say that they owed a duty in relation to the handling of that product to exercise that degree of care which an ordinarily careful and prudent person would use or exercise under the same or similar circumstances commensurate with the dangers to be reasonably anticipated from the handling and distribution of natural gas.
>
> "Now the plaintiffs in this case claim that the defendant has failed to exercise that degree of care which the law casts upon it and that the defendant was thereby negligent, and as a result of such negligence the explosion in question occurred and the damage to the Martin building and the personal property contained therein was thereby occasioned.
>
> * * *
>
> "Before the plaintiffs are entitled to recover in this case, you must find and believe from the evidence that if there was an explosion of natural gas in the Martin building in question, that gas came from the leak in the service pipe line exhibited to you in evidence. If the explosion in question or any damage occasioned to the Martin building as a result of explosion or fire was caused by any other source of natural gas, if it was a natural gas explosion, came from any other source than the leaks mentioned in evidence and as exhibited before you in the service pipe in question,

then under those facts and circumstances the plaintiffs in this case are not entitled to a verdict at your hands and you should return a verdict in favor of the defendant in this case on all three of the forms of verdict that will be submitted to you.

* * *

"Under the law and the facts of this case, the defendant's only duty in respect to that service line arose, if it ever did arise, after the defendant had some knowledge of the leakage of gas from that particular service line, or notice of a defect in said line which would imminently cause gas to leak therefrom if it was not replaced or repaired, and thereafter to take such reasonable steps as were necessary to prevent the danger arising from the escape of any natural gas from any defect in said line thereafter remaining operative. * * *

* * *

"Under the law, as I say to you, the service line in question, that is, from the shut-off cock to the curb line in Moreau Street to the building, belonged to Mr. Martin and it was the duty of Mr. Martin to keep that service line in safe operating condition and free from holes from which natural gas might escape.

* * *

"So it comes down to this, in this statement of the law that I have given to you, that if the defendant had knowledge or means of knowledge of an actual leak in this service line, then the defendant was required to use ordinary care in respect to that knowledge of any such leak. If the defendant had knowledge of surrounding facts and circumstances which would lead the defendant to know and have notice that there was an imminent danger, that is, a danger within a reasonably short period of time, which an ordinarily prudent and careful person would consider as a reasonable period of time, that if this particular pipe had a defect in it it would leak gas, then the defendant

would be required to take some action in respect to the service line. But if the defendant did not have actual knowledge of the leaking of gas from the service line or by the exercise of due care could not have had such knowledge, and there were no facts revealed to the defendant from which the defendant would have knowledge or notice that there was imminent danger of a leak in the service line, that any conditions existing in the service line liable to leak gas were remote or contingent, then the defendant would not be liable and there was no duty on the part of the defendant in this case to take any action in respect to this particular piece of service line that was introduced in evidence before you."

The interpretation and application of Missouri law in the instant case by the able judge who presided at the trial must and should be adopted on appeal, unless "the burden of demonstrating that the judgments appealed from are the result of a clear misconception or misapplication by the District Court of local law * * * [has been carried by the plaintiffs]. As this Court has frequently pointed out, that burden, in cases such as these, is a heavy one. * * * The question for review is not whether the conclusion of the trial court as to a question of local law is necessarily correct, but whether the court reached a permissible conclusion, * * * that is, such a conclusion as this Court reasonably may believe that the Supreme Court of the State would or might reach, were it called upon to decide the question." See *Milwaukee Insurance Company* v. *Kogen*, 8 Cir., 240 F.2d 613, 615.

It is obvious to us that the experienced court presiding at the trial gave every consideration to proper application of controlling Missouri law to the facts and evidence of the instant case, and on that basis the Court correctly submitted all pertinent issues to the jury. As Judge John

B. Sanborn said in his well-considered opinion in the last-cited case, the burden required for reversal in cases of this type is a heavy one. In our opinion that burden has not been sustained by plaintiffs. The trial court's charge, considered in its entirety, is a correct statement of Missouri law. In our opinion the trial court committed no error.

Concluding, it is sufficient to say that we have carefully considered the arguments and briefs of plaintiffs' able counsel, and we find no basis for holding contrary to the judgments appealed from.

The judgments appealed from are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,698.

Naomi Wood, Appellant,

vs.

The Gas Service Company, Appellee.

Appeal from the United States District Court for the Western District of Missouri.

No. 15,699.

Alfred F. Martin, Appellant,

vs.

The Gas Service Company, Appellee.

Appeal from the United States District Court for the Western District of Missouri.

No. 15,700.

Biltwell Company, Inc., Tipton Manufacturing Company, Glenridge Trousers Company, and Embassy Manufacturing Company, Appellants,

vs.

The Gas Service Company, Appellee.

Appeal from the United States District Court for the Western District of Missouri.

On Petition for Rehearing.
[July 11, 1957.]

Before GARDNER, Chief Judge, JOHNSEN, Circuit Judge, and DONOVAN, District Judge.

DONOVAN, District Judge.

Appellants have filed a petition for rehearing, which seeks to reargue the questions involved and taken into account by us in our previous opinion.

Among the things particularly attempted to be stressed in the petition for rehearing is the circumstance that the portion of the service pipe which appellants claimed to be defective was located in the curbing or sidewalk section and thus not technically within the lot line of the property, so that the gas company ought to be held to have a responsibility for its inspection. The trial court regarded the Missouri rule, as to the lack of general duty of a gas company to inspect or maintain service pipes belonging to a property owner, as having application to the whole of such a service pipe extending from the curb line into the building.

The Missouri decisions seemed to us to afford no basis for us to declare that this practical concept and evaluation as to local law was in the situation clearly erroneous. Realistically we know that property owners generally have the use of such a curbing or sidewalk section, to the extent that it does not interfere with the need or exercise of the public's use. In fact, the Missouri Supreme Court has specifically said:

> "According to the laws of this state, the property owner in cities, towns, and villages owns the land to the center of the adjoining street, subject to the easement of the city. It has the right to subject the street to any and all of the uses or purposes for which the the street was acquired; but until it does so subject it

to one or more of those uses, or so long as he and the city can jointly occupy and use the street without doing 'violence to the full, free and complete exercise of the public easement', he is to that extent just as much the owner of the property to the center of the street as he is of the remainder of the lot, and has the same right to use it in any manner and for any purpose he may see proper not inconsistent with the rights of the public." *Cartwright* v. *Liberty Telephone Co.*, 205 Mo. 126, 103 S.W. 982, 984.

Appellants' attempt to reargue their other contentions does not call for further discussion.

The petition for rehearing is accordingly denied.

GARDNER, Chief Judge, dissenting.

This matter is now before us on appellants' petition for rehearing. My associates have decided that a rehearing should not be granted but I have not been able to concur in that view and shall state briefly my reasons for my dissent.

A few facts supplemental to those stated in the opinion, called to our attention by the petition for rehearing, should, I think, be stated.

The leaking service pipe from which the gas causing the explosion escaped was not located on the plaintiffs' private property but was located in the public street, or at least the jury on the undisputed evidence could have so found. The service pipe here involved was installed under the supervision of and by the employees of defendant's predecessor in 1932 or 1933 and was part of its system. The undisputed evidence showed that the defendant by reason of its franchise installed, maintained and controlled its main lines and all such service gas lines as were located in

the public street, and that it and it alone had the right to control or the facilities to repair or inspect the same. There was undisputed evidence that in 1950 defendant removed thirty-four feet of two-inch main line pipe and in 1951 removed six hundred twenty-five feet of four-inch main line pipe from the streets, all in the immediate vicinity of the property here involved, because it had become corroded and was found to be leaking and in a defective condition. These pipes had been in the ground about twenty years. It also appears that subsequent to the explosion in the instant case the defendant without permission of the property owner removed that portion of the service pipe from which the gas causing the explosion escaped.

In their petition for rehearing plaintiffs sharply call to our attention certain decisions of the Supreme Court of Missouri which they assert have been overlooked both by the trial court and this court in determining the issues in this case and it is also claimed that the trial court and this court have without warrant assumed the existence of certain facts bearing on the question of notice to the defendant of the condition of the lines used by it in transporting its gas, and that without independently examining the law of the state of Missouri to ascertain whether there was any law or whether the state law was doubtful on the issue involved we have accepted the views of the learned trial judge.

The opinion relies largely on what is said by this court in *Skelly Oil Co.* v. *Holloway*, 8 Cir., 171 F.2d 670, as stating the applicable law. In that case the service pipe was located wholly upon privately owned property and the case did not involve the question here involved, whether the defendant should be charged with notice because of

surrounding facts and circumstances such as are present in the instant case. It is worthy of note, too, that the opinion in the *Skelly* case makes no mention of *Golden* v. *National Utilities Co.*, Mo., 201 S.W.2d 292, and it was not called to the attention of the court although it was handed down a short time before the opinion of this court.

In the instant case the court instructed the jury that:

> "* * * under the law there was no duty or obligation on the part of the defendant to maintain the gas service line located between the shut-off cock and the curb on Moreau Street leading up to the meter next to the building, in a safe condition or to *make any physical inspection of that line to determine whether any gas was actually leaking from the line prior to the time of the occurrence in question.*" (Italics supplied)

This instruction manifestly assumed that the service pipe here involved was on plaintiffs' private property and that defendant had no notice of its defective condition. In the instant case the defendant, as has been observed, under its franchise maintained a system of gas lines through which it transported its gas to consumers and this system included service lines and it had the exclusive right to maintain, inspect and control these lines, at least up to the property lines of the consumers. It, and not the plaintiffs, had all the attributes of ownership of its system of lines lying in the public street through which it transported its gas to consumers.

The court declined to give the following instruction requested by plaintiffs:

> "* * * you are instructed that knowledge does not necessarily mean positive information of an unsafe pipe brought directly home to the defendant, but includes knowledge of facts or circumstances that would cause a reasonably prudent person so situated to in-

vestigate, where a reasonable investigation would disclose the presence of an unsafe pipe."

Apparently the trial court was of the view that actual notice to the defendant of any defect in this service pipe was necessary as it refused this instruction to the effect that knowledge of facts or circumstances which would cause a reasonably prudent person so situated to investigate, where a reasonable investigation would disclose the presence of an unsafe pipe. Under the law of Missouri, as announced in the *Golden* case, supra, which was a gas explosion case, I think this requested instruction should have been given. In that case the court among other things said:

> "'A notice is regarded in law as actual when the party sought to be affected by it knows of the existence of the particular fact in question, or is conscious of having the means of knowing it, although he may not employ the means in his possession for the purpose of gaining further information.' Actual notice often means knowledge of facts and circumstances sufficiently pertinent in character to enable reasonably cautious and prudent persons to investigate and to ascertain the ultimate fact. 46 C.J. 539, 540. In 20 Ruling Case Law, pages 346-347, it is said: '*Whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand* (emphasis ours); and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. This, in effect, means that notice of facts which would lead an ordinarily prudent man to make an examination which, if made, would disclose the existence of other facts is sufficient notice of such other facts. * * * Where there is a duty of finding out and knowing, negligent ignorance has the same effect in law as actual knowledge.' In 38 Am.Jur. Sec. 24, p. 667, it is said: 'Every person is under a duty to exercise his senses and intelligence in his actions in order to avoid

injury to others, and where a situation suggests investigation and inspection in order that its dangers may fully appear, the duty to make such investigation and inspection is imposed by law.' "

It is again to be observed that the defendant had actual notice of the corroded and leaking condition of the pipes which it had removed in the immediate vicinity of this property. It had notice of the length of time that these pipes were in the ground and it also had knowledge of the length of time the service pipe here involved, which was part of its system, had been in the ground, and the question as to whether or not this knowledge was not such as to put it on inquiry should not have been taken from the jury, and our own decisions, notably *Gas Service Co.* v. *Helmers*, 8 Cir., 179 F.2d 101, and *Gas Service Co.* v. *Payton*, 8 Cir., 180 F.2d 505, both handed down subsequent to the *Skelly* case, review the decisions of the Supreme Court of Missouri and clearly indicate that this court has accepted and followed the teaching of the *Golden* case as the applicable controlling state law of Missouri. Thus in *Gas Service Co.* v. *Helmers*, supra, it is stated, quoting largely from *Barrickman* v. *National Utilities Co.*, Mo. App., 191 S.W.2d 265, and *Messmer* v. *St. Louis County Gas Co.*, Mo. App., 42 S.W.2d 963:

"The rule in Missouri is that 'ordinarily a gas company is under no duty or obligation to inspect pipes and appliances in a house which does not belong to it, and is not ordinarily liable for injuries which may have resulted from a defect in the house pipes or appliances unless some causal connection is shown between some proven defect and some negligence of the gas company.

" 'But notwithstanding such ordinary rule all of the authorities hold that a gas company is to be held to the exercise of a high degree of care which is commensurate with the deadly and dangerous character

of its product, and even though the defect is in appliances belonging to the consumer, if the gas company is notified of the escaping gas its duty is to do something about it, either to repair or cause to be repaired the defect or to shut off the flow of gas until repairs are made.' *Barrickman* v. *National Utilities Co.*, Mo. App., 191 S.W.2d 265, 268; *Golden* v. *National Utilities Co.*, 356 Mo. 84, 201 S.W.2d 292; *Skelly Oil Co.* v. *Holloway*, 8 Cir., 171 F.2d 670.

"The *Barrickman* case holds, also that notice means knowledge of 'any fact that would put an ordinarily prudent man upon inquiry * * *.' See, also, *Laughlin* v. *Findlay*, 324 Mo. 1021, 25 S.W.2d 464, 465; *Messmer* v. *St. Louis County Gas Co.*, Mo. App., 42 S.W.2d 963, 965. In the *Messmer* case it is said 'notice or knowledge will be presumed where the facts and circumstances are such that the company, by the exercise of due and proper diligence, might have discovered and remedied the defect complained of in timely manner.'"

In *Gas Service Co.* v. *Payton*, supra, this court, referring to the *Helmers* case, said:

"* * * notice means knowledge of 'any fact that would put an ordinarily prudent man upon inquiry.'"

Here the defendant knew the very dangerous character of the product it was supplying to customers. It had actual knowledge that pipes which had been in the ground for some twenty years in the immediate vicinity of the service pipe here in question had become corroded resulting in leaks. The pipe in question was a part of its system through which it transported its dangerous product and it knew, or was chargeable with knowledge, that this service pipe had been in the ground for some twenty years. It, and it alone, had the means of detecting leaks in its gas system and it, and it alone, had the right to repair such leaks. It was charged with expert knowledge of the characteristics

of its product and the condition of its pipeline system. It is to be noted that the court by its instructions removed from consideration of the jury the circumstance that the evidence showed without dispute that six hundred twenty-five feet of defendant's pipe in the immediate vicinity of the property here involved had been removed after it had been in the ground for twenty years or more and was found to be in a corroded and leaky condition.

I think the requested instruction properly stated the applicable law and the refusal to give it was prejudicial error. I think the court was also in error in giving the above quoted instruction to the effect that defendant had no duty to make any inspection of the line in question prior to the time of the occurrence in question, and it was likewise error to take from the consideration of the jury the circumstance that defendant had removed from its system pipes in the immediate vicinity of the property in question found to be corroded and leaking.

Manifestly, there is no dearth of authority in the decisions of the Supreme Court of Missouri on the questions here involved. Nevertheless, the court in its decision did not consider these controlling authorities but instead accepted the views of the trial judge—thus, in effect, depriving appellants of their right of review by this court.

The present law of Missouri on the question of notice as to defects in the gas lines through which the company's product is transported to customers, as disclosed by the *Golden, Barrickman, Messmer, Helmers* and *Payton* cases, does not differ materially from that of other jurisdictions. The Supreme Court of Minnesota in *Manning* v. *St. Paul Gaslight Company*, 151 N.W. 423, makes this observation:

> "Whether defendant owns the pipes in which its gas is confined or not is not important, for the fact

remains, such pipes are of its choosing as to kind, quality, and method of installation. They are not subject to the care or interference of any one but defendant."

In *Washington Gaslight Co.* v. *District of Columbia*, 161 U.S. 316, the Supreme Court among other things said:

"Nor do we think that this duty was affected by the circumstances that the cost of the labor and materials used in the construction of the connection and gas box was paid by an occupant or owner of property who desired to be furnished with gas. As the service pipe and stopcock was a part of the apparatus of the company, and was used for the purpose of its business, it is entirely immaterial who paid the cost, or might, in law, on the cessation of the use of the service pipe and gas box by the company, be regarded as the owner of the mere materials."

In *Julian* v. *Sinclair Oil & Gas Co.*, Okla., 32 P.2d 31, the Supreme Court of Oklahoma points out that:

"The gas which caused the damage was defendant's gas, and was turned into the pipes by defendant with knowledge on its part that it was a highly dangerous substance and subject to escape. Through the duly appointed agents and employees, defendant was charged with knowledge that its gas was being transported through the pipes in question."

In *Mattson* v. *Central Electric & Gas Co.*, 8 Cir., 174 F.2d 215, we considered the question of the sufficiency of the evidence to take to the jury the question of notice. That too was a gas explosion case. On this point we said:

"The natural gas which the Company was transmitting through this pipe was of highly dangerous character and it owed a duty to the public to exercise a degree of care commensurate with the danger involved in the transaction of its business. It knew when

this gas line was laid and it was its duty to know what the probable life of the gas pipe would be in the soil where it was laid. While the defendant did not have actual notice that gas was escaping from this perforated pipe, it did know that gas would escape from a perforated pipe and it was charged with knowledge, at least the jury might have so found, that this pipe had probably become perforated. It knew that the pipe had been in the ground for more than twenty-five years and it, rather than the plaintiff's decedent, should have known what the condition of the pipe was and the danger arising from its deteriorated condition. Under the circumstances disclosed by the record the jury might properly have charged the Company with constructive notice and if so that notice is just as effective as actual notice."

I conclude that plaintiffs have not had a fair trial in this case and that on appeal this court has erroneously interpreted the applicable law of Missouri and has overlooked and failed to give effect to undisputed facts, and that in the furtherance of justice a rehearing should be granted.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

OCT 13 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

Consolidated Cases No. 501.

NAOMI WOOD,
Petitioner,

vs.

THE GAS SERVICE COMPANY,
Respondent.

ALFRED F. MARTIN,
Petitioner,

vs.

THE GAS SERVICE COMPANY,
Respondent.

BILTWELL COMPANY, INC., TIPTON MANUFACTURING CO., GLENRIDGE TROUSERS COMPANY, and EMBASSY MANUFACTURING COMPANY, *Petitioners,*

vs.

THE GAS SERVICE COMPANY,
Respondent.

PETITIONERS' REPLY BRIEF.

WILLIAM S. HOGSETT,
HALE HOUTS,
ALVIN C. RANDALL,
J. D. JAMES,
1122 Rialto Building,
Kansas City, Missouri,
Counsel for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

Consolidated Cases No. 501.

NAOMI WOOD,
Petitioner,

vs.

THE GAS SERVICE COMPANY,
Respondent.

ALFRED F. MARTIN,
Petitioner,

vs.

THE GAS SERVICE COMPANY,
Respondent.

BILTWELL COMPANY, INC., TIPTON MANUFACTURING CO., GLENRIDGE TROUSERS COMPANY, and EMBASSY MANUFACTURING COMPANY, *Petitioners,*

vs.

THE GAS SERVICE COMPANY,
Respondent.

PETITIONERS' REPLY BRIEF.

Defendant contends that under the evidence "a correct result was reached" in the trial (Deft's Br., pp. 2-11, 24).

Conceding that there was evidence to support a verdict for either party even if the Missouri law had been applied, the point is, the controlling Missouri law was *not applied* and plaintiffs were thereby precluded from recovery. Defendant's argument, that it had a meritorious defense anyhow, evades the issue.

Insofar as the defendant's brief bears at all upon the issues here, it is founded upon numerous inaccurate, misleading statements. To point out all such inaccuracies would unduly lengthen this reply, but some of those that pertain to certain fundamental facts must be dealt with.

As to Knowledge of Facts Putting on Inquiry.

No less than six times the defendant says that there was *no evidence*[1] that the defective pipe was installed as early as 1932 or 1933 (Deft's Br., pp. 4, 6, 16, 17, 21, 32), and charges that Judge Gardner erroneously stated in his dissenting opinion that "this service pipe had been in the ground for some 20 years" (Deft's Br., p. 21). There was such evidence (R. 18, 32),[2] and Judge Gardner in his dissenting opinion *properly treated as true for the purpose of the issues on appeal that evidence favorable to plaintiffs.* Defendant's charge that Judge Gardner misconstrued the

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[1]All italics ours unless otherwise noted.

[2]Sam Thixton, the then Street Commissioner of Tipton, recalled when the line was laid, and it was his best recollection that the whole line up to the meter (this included the defective line) was laid in 1932 or 1933 (R. 32). J. J. Brant believed that his company, which occupied the second floor of the building in question, had gas ever since 1933, and that it came through the meter "shown in the picture" (which was the meter to which was connected the defective line) (R. 18). The testimony of Lonnie Bell (R. 76, 77) (S. R. 22, 23), at most, did nothing more than make an issue of fact for the jury.

evidence is not supported by the record and is unfounded in fact, and defendant's argument based thereon is without validity.

The defendant now (for the first time) concedes in effect that it was liable if it refused to investigate in the face of facts and circumstances putting it on inquiry, but says that the trial court's charge "considered as a whole" repeatedly so advised the jury in words "almost identical" to plaintiffs' refused instruction and that Judge Gardner overlooked this fact (Deft's Br., pp. 15, 16, 21). The language of the charge itself refutes such assertion.

The trial court's charge plainly required actual knowledge. The references therein to "facts and circumstances" were confined to facts and circumstances *causing defendant "to take notice that said service line was leaking gas* (R. 88)." Obviously this is just another way of requiring that real knowledge of a leak be by some means brought home to the defendant. But plaintiffs had a right under the Missouri law to recover for *negligent ignorance*, that is, refusal to investigate where facts give rise to a duty to investigate.

It is difficult to believe that the defendant is serious when it says that the court's charge placed upon the defendant a duty to inquire or inspect. The trial judge did not think so. His comments show clearly that he took the view that there was no such duty, absent actual knowledge of a leak, saying there was "no duty whatsoever under the Missouri Law to inspect where there is just a likelihood of a leak" (R. 26-27, 64). Moreover, the trial judge's meaning was made clear by his after-verdict comment to the jury that the verdict was proper "because definitely there was no notice of any actual gas escaping made known to the defendant in this case." (R. 103).

The trial court's charge speaks for itself. It advised the jury there was no duty to inspect and thus deprived plaintiffs of a right of recovery based upon negligent ignorance. Defendant's belated efforts to give the charge a different meaning serve only to emphasize that (as Judge Gardner said) the charge, and the Court of Appeals decision approving it, were contrary to the "controlling state law of Missouri" (A. 15).

As to Ownership.

Five different times in its brief (pp. 26, 27, 30, 32, 35) the defendant states that the evidence established ownership of the pipe in the customer. This statement is not correct. The defendant bases such statement on the false premise that under its franchise the original gas company *was not permitted* to lay service lines beyond the curb. This false premise was stated no less than six times in defendant's brief (pp. 19, 20, 26, 31, 32), but the fallacy is nonetheless apparent. Section 1 of the franchise gave the original gas company the *right to lay lines* "*in all streets, avenues, alleys, bridges and public places*" (R. 63). The defendant never mentions Section 1, but dwells instead upon Section 4, which *requires* the Company to install lines up to the curb *free of charge* (R. 62). *Requiring* the Gas Company to install lines up to the curb free of charge does not mean it has no right or authority to install lines beyond the curb, defendant's oft-repeated statements to the contrary notwithstanding.[3]

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[3]In fact the record shows that the Company *did* install pipe beyond the curb in many instances (R. 49, 50), and while we doubt that it makes any difference *who* installed the pipe in question, there was evidence from which the jury could have found that the then company actually installed the pipe in question (R. 18-19, 32-33, 49-50).

Also misleading is the quotation (Deft's Br., p. 9) of Sec. 9, of the regulations prepared in 1931 by defendant's predecessor company in Tipton, which has to do with the duty to maintain service pipes. Neither Sec. 9, nor the other sections referred to by defendant, were read to the jury, and they have no bearing on the issues here. Furthermore, defendant's reliance thereon is unjustified because (1) the regulations show on their face that they were abrogated long before the casualty in question (S. R. 27), and (2) the Missouri law as to the duties of the parties takes precedence over the unilateral regulations of a gas company. *Gas Service Company* v. *Helmers*, 179 F.2d 101, 104. The only part of said regulations read to the jury was the part that indicated that the gas company intended that the customer should own *only* the part of the service pipe from property line to the meter (Exhibit 1, R. 61). Defendant concedes that the line in question was *outside* the property line (Deft's Br., p. 8).

Defendant also makes many inaccurate statements regarding the controlling law. For example, defendant states that in the case of *Golden* v. *National Utilities Company*, 356 Mo. 84, 201 S.W.2d 292 (said by Judge Gardner to announce the controlling law), *the evidence was "undisputed" that the gas company owned the pipe, and that it was "on the basis of such proof of ownership"* that the Missouri Supreme Court held that the gas company had a duty to inspect (Deft's Br., p. 21). On the contrary, as the most cursory reading of the Golden opinion discloses, the question of ownership did not enter into the court's decision and was not even discussed. The court held that the defendant should have inspected the pipe which caused the casualty because of the fact that other pipe of the same age in the area had been found defective.

The repeated inaccuracies in defendant's brief pertaining to fundamental matters in issue only emphasize the unsoundness of the defendant's position and the validity of Judge Gardner's charge that the Court of Appeals failed to consider the controlling Missouri authorities and, instead, accepted the rulings of the trial judge contrary thereto—thus, in effect, depriving plaintiffs of their right of review.

We respectfully submit that defendant's brief does not answer the petition, and that for the reasons given in the petition the Writ should issue.

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vs.

THE GAS SERVICE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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RESPONDENT'S STATEMENT OF THE CASE.

In accordance with Rule 40(3) of this Court, respondent submits the following statement solely for the purpose of correcting certain inaccuracies contained in the statement by petitioners in their petition herein.

THE EVIDENCE.

Early on the morning of January 31, 1955, two noises were heard in the vicinity of Moniteau and Moreau Streets, in Tipton, Missouri (R. 19, 20). The first noise was a kind of a thud, which sounded like something cracking or breaking (R. 20) (S. R. 3). Nothing was observed after the first noise and, after an interval of about three minutes, there was a second noise, louder than the first, which sounded like an explosion (R. 20) (S. R. 3). It was the position of the gas company that the first noise was the collapsing of the old building; that the collapse caused gas pipes inside to break, and that gas escaping therefrom caused the explosion. Immediately after the second noise fire was observed in the Martin building (R. 20). This fire was on the second floor of that building at the corner (R. 21) (S. R. 4). The fire alarm was turned in and within a few minutes several persons, including the volunteer fire department, arrived at the scene (R. 15, 19, 21, 33, 74). Two experts for the plaintiffs, one of them having examined the damaged buildings and debris a few days after the fire, agreed that the casualty was caused by a gas explosion (R. 39, 47). Defendant's expert testified that the first noise was not a gas explosion because there was no blasting effect or flame. He testified that the second noise was a gas explosion (R. 69).

When the volunteer fire department arrived within a few minutes after the second noise, the west wall of the building was already down and debris covered the sidewalk including a gas meter located at the west side of the building (R. 15, 74). In addition, an inside wall which was the next one east from the west wall, had collapsed by the time the firemen had arrived. There was a jet of flame which resembled a torch blaze, which the fire-

men were unable to put out, on the second floor next to the collapsed inside wall (R. 74, 75).

At the point where the meter was located on the sidewalk the bricks from the collapsed wall were in a pile three or four feet high and the meter itself was broken (R. 16, 53). After the debris had been removed from the meter, and after an excavation had been made around the service pipe that was buried in the ground below the meter, it was found that there was a hole in that pipe at a point about twenty-nine inches below the surface where the pipe elbowed from the vertical riser to go horizontally under the sidewalk (R. 52, 59). It was generally agreed that this hole probably was the result of a scaling process known as corrosion, and plaintiffs' experts admitted that such scaling could be held in position against a pipe by surrounding ground with no trouble and that it would be possible for a wall to fall on the pipe and shake the corrosion scale loose, leaving the hole which was found after this casualty (S. R. 16).

Evidence of the Condition of the Pipe and the Question of Knowledge of Facts Putting Defendant on Inquiry.

The service pipe in question was a one and one-fourth inch pipe which ran from the meter on the west side of the building straight down for forty-two inches where there was an elbow. From that point it ran horizontally under the sidewalk for a distance of approximately seven feet where it connected, just beyond the curbing, with a curbcock. Defendant had a four inch gas main running north and south about four feet from the opposite side of the street. From that four inch main there was a two inch main extension running across the street toward the building in question to a point about two feet from the east

curbing. At that point there was a T connection from which a one and one-quarter inch pipe ran about eleven feet east to the curbcock which connected with the service pipe in question. Another section of the one and one-quarter inch pipe extended about twenty-one feet west to another curbcock connecting with a service pipe leading to a second meter also on the outside of the building in question (S. R. 33, Ex. 17). That service pipe in which a hole was found after the casualty was removed in its entirety and was examined by plaintiffs' experts. All portions of the pipe that had been below the ground showed characteristic signs of soil corrosion (R. 38). However, the degree of corrosion varied and a different degree was found just twenty inches from the hole (S. R. 11). With the exception of the one hole at the elbow, the remainder of this pipe was found to be fairly sound in that there were no holes in it and it would carry gas (S. R. 11). Even using a magnifying glass to go up and down the pipe, the plaintiffs' experts were unable to find any hole in the pipe except that in the elbow, and admitted that, if that part of the pipe out into the street had been opened for inspection, no hole would have been obvious or visible; that it would be necessary to go through under the sidewalk to the elbow before any visible hole could have been found (S. R. 15, 16).

Defendant's four inch main had been installed along the west side of the street, across from the building in question, when gas was first introduced in Tipton, which was about 1931 or 1932 (R. 18, 50, 53). There was no testimony as to when the two inch line leading from the four inch main across the street toward the Martin building was installed, but one witness stated he thought this took place something like 1932 or 1933 (R. 32) (S. R. 9). There was no direct testimony when the service line lead-

ing up to the meter was installed, but this same witness stated that he thought it was laid at the same time as the two inch line (R. 32) (S. R. 9). There was positive testimony that the meter was installed in 1939 and that there had been no meter outside the building at the location of this service pipe prior to that time; that when the meter was installed there was evidence of fresh digging underground (R. 76, 77) (S. R. 22). The Telephone Company was one of the first users of gas in Tipton, and was occupying the second floor of the west Martin building when gas was first installed (R. 18). It was not shown whether that service for the Telephone Company came in from the alley at the rear of the property or came in from the street, the witness not recalling that fact (R. 19) (S. R. 1). The two inch line crossing the street east from the main was installed by employees of the gas company that distributed gas in Tipton at that time (R. 33). The Telephone Company did not install Exhibit 25, which was the service pipe involved in this action (R. 18, 19). All witnesses testified that they did not know who installed this line (R. 18, 19, 33) (S. R. 2).

In October, 1950, the defendant replaced thirty-four feet of the two inch line running across the street from the four inch main. In July, 1951, the defendant replaced six hundred twenty-five feet of its four inch main, most of which was located in the alley at the rear of the building in question (R. 52, 53). This alley was one hundred sixty feet west of the connection of the two inch main extension with the four inch main, across the street from the west side of the Martin building (Defendant's Ex. 17, S. R. 33). The thirty-four feet of two inch line was replaced because it had leaks in it. However, one of the principal reasons for replacing the more than five hundred feet of four inch main in the alley was that it was buried six to nine feet in the ground. It was so deep that

it required a great deal of time digging. Defendant wanted to get a more shallow line in the alley so that the line could be maintained by it more efficiently (R. 57) (S. R. 19).

There was no evidence in the record that defendant had any knowledge as to the length of time the service pipe in question had been in the ground, because there was no proof as to the date of its installation. The defendant did not tell Mr. Martin, owner of the building, that it had replaced the pipe owned by it in 1950 and in 1951 (R. 59, 60). When the defendant dug up the service pipe in question after the casualty (it was never stated to be "the pipe which caused the casualty"), it was then found (as of January 31, 1955), to be in about the same corroded condition as the two inch pipe had been when it was removed in October, 1950, or four years and three months earlier (R. 54).

In its instruction to the jury, the trial court, with reference to the defendant's duty, told the jury that if the defendant knew, or by the exercise of ordinary care, could have known that there were defects in the line which made it imminently dangerous and unsafe for transporting gas, then defendant had a duty either to repair or to shut off the gas and to notify Martin to make repairs before the line should be used for gas; that it was not necessary for the defendant to be liable, to have actual knowledge of the location and size of the defect and leak, but only necessary that the defendant had knowledge of surrounding facts and circumstances sufficient to indicate that there was either a leak or a defect of such nature that there was danger of an imminent leak (R. 88). The trial court also charged the jury that if the defendant knew, or by the exercise of proper care, could have known, that there was gas actually escaping from the line, then the defendant

had the same duty to do something in respect to the escaping gas and either to repair the line or to shut off the gas until Martin did so (R. 101). The trial court further instructed the jury that if the defendant had knowledge of surrounding facts and circumstances which would lead the defendant to know and have notice that there was an imminent danger, which an ordinarily prudent and careful person would consider as a reasonable period of time, that, if this particular pipe had a defect in it, it would leak gas, then the defendant would be required to take some action in respect to the service line (R. 89).

After the jury had retired and was deliberating, it requested the trial court to repeat for it that part of the charge dealing with the responsibilities of the defendant with reference to testing the service line from the curb-cock to the meter and its responsibility to notify plaintiff, Martin. At that time the court repeated its instruction regarding the duties of the defendant, out of context with the rest of its original charge. It then instructed the jury that the defendant's only duty to act with reference to this service line would arise, if it did, after the defendant had some knowledge of the leakage of gas from the service line, or, knowledge of surrounding facts and circumstances which would lead the defendant, or a careful and prudent person engaged in the same line of business, to know that a defect existed in that line which would imminently cause gas to leak therefrom; that, if the defendant had "knowledge of surrounding facts and circumstances which would lead the defendant to know or by the exercise of ordinary care it should have known, that there were any defects in the line which would imminently cause gas to leak from that line", then the defendant had the duty either to repair the line if it continued to permit gas to flow through it or to warn plaintiff Martin of the con-

dition and require him to make repairs and shut off the gas until he did so (R. 99, 100).

At the same time the court also told the jury that if the defendant knew, or "by the exercise of that degree of care which the law places upon it, could have known" that there was gas escaping from the line, then the defendant had the same duty with respect to the escaping gas and should either repair the line or have had plaintiff Martin repair the line and shut off the gas until he did so (R. 101).

Evidence As to Ownership and Control.

The evidence in this case was undisputed that the service pipe in question was located outside the property line of Mr. Martin and was under the sidewalk. There was, however, no evidence showing any ownership of the service line by the defendant gas company at any time. On July 21, 1930, defendant's predecessor company was granted the original franchise to supply gas in Tipton, Missouri, by Ordinance 108 (Defendant's Ex. 31, R. 62, 63). Section 4 of that ordinance contained the following provision:

> "Grantee shall furnish free of charge and install for his customers reliable meters or other instruments for the measurement of gas sold and shall keep the same in repair without cost to the customer; all meters or other devices used by the Grantee shall at all reasonable times be subject to inspection by the City and the City shall have the right to test said meters and devices at reasonable times. Grantee shall also furnish and install at his own expense proper and suitable and adequate service for each customer *from mains to the curbline, if such mains are located in the street and from mains to the property line, if same be located in alleys*, and all such mains and laterals

shall be adequate in size and construction." [Emphasis supplied].

The rules and regulations of the defendant's predecessor, effective November 1, 1931, and approved by the Missouri Public Service Commission, were received in evidence as Defendant's Exhibit 1. Page 4 of those regulations (S. R. 27) contained the following pertinent paragraphs:

> "7. *Service Lines.* The service line shall be connected to the company line at curb or lot line and shall be constructed, tested and approved in accordance with the rules and regulations established by the company.
>
> * * *
>
> "9. *Customer Responsible for Maintenance of Lines.* All service and house lines from the curb or lot line shall be kept and maintained in good condition by the customer or owner. When leaky or hazardous conditions of the service or house lines are found, repairs shall be made promptly by the customer or owner."

Page 9 of Defendant's Exhibit 1 (S. R. 31) contains the following provision:

> "6. *Owners Shall Maintain Own Lines Satisfactorily.* All service and house lines and fixtures from the curb or lot line installed at the expense of the owner or customer shall be kept and maintained in condition satisfactory to the company. When inspected and found in leaky or hazardous condition the gas will be shut off until repairs are made."

The evidence was undisputed that the defendant's main from which service was supplied to the buildings of the plaintiff Martin was located in the street and not in an alley (Plaintiffs' Ex. 17, S. R. 33). Plaintiffs' Ex-

hibit 23, the deed of plaintiff Martin to the property in question (S. R. 35), recited that he was to have the described premises "with all and singular the rights, privileges, appurtenances and immunities thereto belonging or in anywise appertaining".

The only evidence with reference to control of any of the instrumentalities involved was testimony that the defendant gas company had exclusive control over the meter, which they tested and checked themselves and which they would not permit anyone else to test or check without their permission (S. R. 17). There was no testimony, as stated by petitioners, that the defendant "alone had the right and ability to control the pipe and the flow of gas into it, and to test the pipe for leaks".

The evidence showed that it was the opinion of the experts called by the plaintiffs that there had been a hole in this pipe for as much as six months before the fire in the size that it was found after the fire had occurred (R. 42, 47), and that gas under four pounds of pressure, if the hole had existed that long, would have leaked out of it and gone into the building in substantial quantities during all of that time (R. 42, 47) (S. R. 12, 13, 15). All expert testimony established that, if gas had been leaking from any hole in this pipe, it would have been going into the building, rather than remaining under the sidewalk or under the street (R. 42, 47, 67). Under the circumstances that existed in this building, had gas been leaking from a hole in this pipe it would have been going into the building every weekend when it was closed, probably at times reaching dangerous proportions, but there was no ignition before this time, according to plaintiffs' expert witness (R. 42). However, no one had smelled natural gas in the building at any time before the fire (R. 23, 77).

The service pipe with the hole in it was removed without the express permission of Mr. Martin by the defendant, after the fire, but it was removed with his knowledge, since he was present when it was being dug up. He did not ask the defendant's employees why they were removing the pipe and did not either complain or protest (R. 27) (S. R. 20).

At the close of plaintiffs' case, the trial court ruled that there was no evidence to the effect that the defendant company was the owner of the service pipe under the sidewalk; that the rules and regulations in force at the time the pipe was laid showed that the ownership of the service pipe in question was in the owner of the premises; that, absent direct proof of ownership in the defendant, it would be held, as a matter of law, that the service pipe belonged to the plaintiff Martin (R. 65, 66).

REASONS WHY WRIT OF CERTIORARI SHOULD NOT BE ALLOWED.

I.

There Was No Conflict Between the Decision of the Court of Appeals and the Applicable State Law.

Petitioners contend, at the outset, that the trial court instructed the jury that the defendant "under no circumstances had any duty to make any inspection or inquiry as to the condition of the pipe in question absent actual, direct knowledge of the leak". They then, in their footnote No. 4 on Page 7, attempt to paraphrase the court's instruction. In so doing, they have omitted certain vitally important portions of the instruction, which respondent desires to quote, verbatim. These are as follows:

"However, if the defendant knew, or by the exercise of ordinary care, could have known that there were defects in said service line which made the service line imminently dangerous and unsafe for the transportation of natural gas, and that the defendant knew or by the exercise of ordinary care, could have known that said service line was then and there imminently dangerous and unsafe, and that there was some immediate danger then existing of the escape of natural gas from said line, then defendant had the duty to repair said line or to take some action in respect to said line or notify Mr. Martin to make repairs thereto before the service line was continued to be used for natural gas.

"Now, under the law, it was not necessary that the defendant have actual notice of the location and size of the defect and leak of gas from the service line in question. If defendant had knowledge of facts and circumstances sufficiently pertinent in character to enable a reasonably cautious and prudent person engaged in the business of distributing natural gas to take notice that said service line was leaking gas or was so defective that natural gas would imminently escape from some part of said line if it was immediately continued to be used to transport natural gas, then it may be said that the defendant had knowledge of facts sufficient to cause it to reasonably act in some respect as to the service line in question." (R. 88).

"The knowledge of any surrounding facts and circumstances which you find that the defendant should have had notice of should be such as show that the defendant had notice of some defect in the service line from which gas was leaking, or from which gas would with some immediacy leak, or which would imminently leak if the service line was continued to be used for the transportation of natural gas, and not such notice to defendant that gas would merely probably leak from said service line sometime in the distant or remote future." (R. 89).

"* * * If the defendant had knowledge of surrounding facts and circumstances which would lead the defendant to know and have notice that there was an imminent danger, that is, a danger within a reasonably short period of time, which an ordinarily prudent and careful person would consider as a reasonable period of time, that if this particular pipe had a defect in it it would leak gas, then the defendant would be required to take some action in respect to the service line. But if the defendant did not have actual notice of the leaking of gas from the service line or by the exercise of due care could not have had such knowledge, and there were no facts revealed to the defendant from which the defendant would have knowledge or notice that there was imminent danger of a leak in the service line, that any conditions existing in the service line liable to leak gas were remote or contingent, then the defendant would not be liable and there was no duty on the part of the defendant in this case to take any action in respect to this particular piece of service line that was introduced in evidence before you." (R. 89, 90).

"* * * if you further find that prior to the time of said explosion and fire the defendant, acting by and through its agents and employees, knew or in the exercise of that degree of care which is placed upon the defendant as a distributor of natural gas, should have known of the defective condition of said service line and the leakage of natural gas therefrom in time by the exercise of ordinary care on the part of the defendant to have prevented said explosion and fire by either repairing or causing said service line to be repaired, or warning Mr. Martin of leaks in the service line and shutting off the flow of gas therein until repairs were made in this service line by Mr. Martin, and if you find the defendant negligently failed so to do, then if you find those facts to be from the evidence you should return a verdict in this case in favor of all three of the plaintiffs and against the defendant * * *." (R. 90).

After the jury had retired to deliberate, it returned and requested the court specifically for repeated instructions regarding the duties and responsibilities of the defendant company for testing this particular service line and its responsibility to notify the plaintiff, Martin. In response to that specific request the court, among other things, gave the following instructions:

"* * * However, under the law and the facts of this case, the defendant's only duty to act in respect of that service line would arise, if it did arise, after the defendant had some notice of the leakage of gas from the service line, or knowledge of surrounding facts and circumstances which would lead the defendant, or a careful and prudent person engaged in the same line of business, to know that a defect existed in that line which would imminently cause gas to leak therefrom. That is to say that if the defendant had knowledge of surrounding facts and circumstances which would lead the defendant to know or by the exercise of ordinary care it should have known, that there were any defects in the line which would imminently cause gas to leak from that line, then it was the duty of the defendant to either itself make repairs to the line, if it continued to permit gas to flow through the line with such knowledge, or to warn Mr. Martin of the condition of that line and require Mr. Martin to make the repairs thereto and shut off the gas flowing through the line until he did make such repairs." (R. 99, 100).

"* * * If the defendant or by the exercise of that degree of care which the law places upon it, could have known that there was gas escaping from this line, that is, actually escaping from the line, then of course, the defendant had the same duty to do something in respect to that escaping gas and to either repair the line itself or have Mr. Martin repair the line and shut off the gas until he did so." (R. 101).

We have set out these portions of the court's charge to the jury because of the repeated assertion by petitioners that the trial court had refused to instruct the jury that "knowledge" included knowledge of facts putting a reasonably prudent person on inquiry. The instruction requested by the plaintiffs and refused by the trial court is almost identical with the very words used by the trial court in its charge to the jury.

Petitioners' contention that the court did not instruct the jury properly apparently results from petitioners' attempt to rely upon an isolated portion of the charge, which, standing alone, might be so considered. Such isolated portion apparently was relied upon by Judge Gardner in his dissent upon the motion for rehearing because, in his dissenting opinion, he cited only the following portion of the court's instruction (A. 13):

> "* * * under the law there was no duty or obligation on the part of the defendant to maintain the gas service line located between the shutoff cock and the curb on Moreau Street leading up to the meter next to the building, in a safe condition or to *make any physical inspection of that line to determine whether any gas was actually leaking from the line prior to the time of the occurrence in question.*" [Emphasis supplied].

Relying solely upon this isolated portion of the complete charge, Judge Gardner held that it did not properly instruct the jury, because it did not allow the jury to consider knowledge of facts or circumstances on the part of the defendant which would cause a reasonably prudent person so situated to investigate, where a reasonable investigation would disclose the presence of an unsafe pipe. He criticized this particular part of the charge as conflicting with the law of the State of Missouri (A. 14).

What petitioners consistently have overlooked, and what Judge Gardner obviously overlooked in his dissenting opinion, was the fact that, considered as a whole, the charge to the jury, not once but repeatedly, included an instruction that the jury could find for the plaintiffs if it found that the defendant had the very knowledge of surrounding facts and circumstances which petitioners were requesting should be included. It is a well established rule that whether instructions in a particular case could have produced a misconception in the minds of a jury is not to be ascertained by merely considering isolated statements. The court must take into view all the instructions given and tendencies of the proof in the case to which they could possibly be applied. If the charge as a whole correctly states the law, then it cannot be said that, merely because isolated portions are incorrect, the jury was improperly instructed. *Seaboard Airline Railway* v. *Padgett*, 35 S.Ct. 481, 236 U.S. 668, 59 L.Ed. 777.

Petitioners rely heavily upon the dissenting opinion of Judge Gardner on motion for rehearing. The dissenting opinion is set out in full on Pages 11 to 19 of the appendix. A careful reading of the dissent discloses that Judge Gardner had misconstrued the evidence in reaching the conclusions upon which he based his dissent. Thus, he stated (A. 11):

> "* * * The service here involved was installed under the supervision of and by the employees of defendant's predecessor in 1932 or 1933 and was part of its system * * *."

This was an obvious misconstruction, because there was no evidence in the entire record that the service pipe was installed "under the supervision of and by the employees of defendant's predecessors in 1932 or 1933". Petitioners offered only two witnesses concerning the installa-

tion of any line on Moreau Street. The complete testimony of both Witness Brant (R. 18, 19) (S. R. 1, 2) and Witness Thixton (R. 32, 33) (S. R. 9), discloses that any testimony of both witnesses was completely lacking in any probative effect, insofar as installation of this particular line was concerned. For example, while Witness Brant testified that the Telephone Company had been one of the first users of gas in Tipton in 1933 (S. R. 1), he also testified that he did not know whether or not, at that time, the gas service came into the corner building from a line back on the alley at the rear of the building; that he did not know when the meter on the sidewalk was put there; that he could not remember whether the meter was even installed at the time any kind of a line was run across the street and that he did not know who installed the line up to the meter. He could not testify that the gas company had installed it. All he said was that, wherever the gas service originally came from and whoever put that in, he did not know who paid for it or who did it (S. R. 2).

Witness Thixton testified only that he recalled that there had been a line laid across this street (S. R. 9). As far as he could remember he "would think" that this took place in 1932 or 1933, "something like that". (S. R. 9). However, he did not know who laid the line under this sidewalk, or when it was laid. The testimony of both these witnesses obviously lacked anything approaching probative force. They were the only witnesses produced by petitioners on the question of installation and ownership of this particular pipe.

The only positive evidence introduced in the case regarding installation of this particular service line was the testimony of Lonnie Bell, called as a witness by the defendant (R. 76, 77) (S. R. 22, 23). That witness testi-

fied that he rented the first floor of the west building as a restaurant in 1939, which was when he first went to Tipton (R. 76). (S. R. 22). At the time he looked at the building for the purpose of renting it, there was no gas service in the first floor and there was no meter on the outside of the building (R. 76). One of the conditions of renting was that gas service would be supplied for the restaurant stove. When he returned to move into the building, a meter was in place outside the building and there was evidence that the ground had been freshly dug up in that area (R. 76) (S. R. 22). Since there would have been no need for a service line under the sidewalk at this point until there was a meter and line into the building, and, since there had been neither a meter nor a line into the building in 1939, this testimony furnished the basis for a valid inference that the line in question had not been installed until that time, and that it had been installed by the owner of the building, from whom Bell was renting space. He had requested the owner to install such service as a condition of his renting the building.

Furthermore, Defendant's Exhibit 31 (R. 62, 63), which was the ordinance of the city of Tipton adopted July 21, 1930, granting a franchise to the predecessor of the Gas Company to install and operate a gas plant and distributing system in that city, clearly contained the following provision in Section 4:

> "Grantee shall furnish free of charge and install for its customers reliable meters or other instruments for measurement of gas sold and shall keep the same in repair without cost to the customers; all meters or other devices used by the Grantee shall at all reasonable times be subject to inspection by the City and the City shall have the right to test such meters and devices at reasonable times. Grantee shall also fur-

nish and install at his own expense proper and suitable and adequate service for each customer *from mains to the curbline, if such mains are located in the street,* and from mains to the property line, if same be located in the alleys, and all such mains and laterals shall be adequate in size and construction." [Emphasis supplied].

The specific wording of this franchise ordinance, which was shown as being in effect at all times, until replaced by another ordinance in May, 1948, clearly established that the predecessor company was neither obligated nor authorized to install service for any customer beyond the curbline, where the mains were located in the street. The main in question in this case was shown by all the evidence to be located in the street west of the Martin building. This franchise authority, coupled with the complete absence of any testimony establishing that defendant's predecessor had installed the service line in question, clearly contradicts the statement made by Judge Gardner in his dissenting opinion, set forth above.

Again, in his dissent, Judge Gardner stated (A. 11, 12):

"* * * The undisputed evidence showed that the defendant by reason of its franchise installed, maintained and controlled its main lines and all such service gas lines as were located in the public street, and that it and it alone had the right to control or the facilities to repair or inspect the same * * *."

The evidence set forth above clearly shows that this was a misconstruction, because there was positive evidence directly contradicting the statement that the defendant, under its franchise, had the right to install, maintain or control "all such gas service lines as were located in the public street". On the contrary, where, as here, the gas main was located in the street, defendant's franchise

permitted it to install pipes only to the curbline. Furthermore, the rules and regulations of the defendant's predecessor which had been filed with and approved by the Missouri Public Service Commission in 1931, and which were in force and effect at all times within which this service pipe may have been installed, provided in Paragraph 9 of Page 4 (Defendant's Ex. 1, S. R. 27) that all service and house lines from the curb or lot line "shall be kept and maintained in good condition by the customer or owner" and that when "leaky or hazardous conditions of the service or house lines are found, repairs shall be made promptly by the customer or owner". Since the service pipe in question was connected with a gas main located in the street, and since the franchise permitted defendant's predecessor, in such circumstances, to install service only to the curbing, it is obvious that this provision made the customer responsible for the maintenance of this particular service line from the curbing into his premises. Judge Gardner's statement to the contrary, was clearly erroneous.

Again, Judge Gardner, in speaking of pipes owned by the defendant which it had removed from the ground in 1950 and 1951 said (A. 15):

> "* * * It had notice of the length of time that these pipes were in the ground and it also had notice of the length of time the service pipe here involved, which was part of its system, had been in the ground, and the question as to whether or not this knowledge was not such as to put it on inquiry should not have been taken from the jury * * *."

Furthermore, Judge Gardner also said (A. 16):

> "* * * The pipe in question was a part of its system through which it transported its dangerous product and it knew, or was chargeable with knowl-

edge, that this service pipe had been in the ground for some twenty years. It, and it alone, had the means of detecting leaks in its gas system and it, and it alone, had the right to repair such leaks * * *."

We have set forth the above quoted portions of his dissenting opinion because they again demonstrate that he had misconstrued the evidence in arriving at his conclusion. There was no evidence which would establish that the defendant should have known that this service pipe "had been in the ground for some twenty years", in view of the actual testimony which we have described above. There was no evidence that the defendant alone "had the right to repair such leaks", in view of the provision of the regulations that it was the customers' duty to repair leaks in service pipes inside the curbline.

The dissenting opinion of Judge Gardner is subject to a further criticism in that it proceeds on the theory that the trial court failed completely to charge the jury "to the effect that knowledge of facts or circumstances which would cause a reasonably prudent person so situated to investigate, where a reasonable investigation would disclose the presence of an unsafe pipe." (A. 14). What Judge Gardner overlooked in so stating was that the trial court, not once, but on many occasions throughout his charge, including an additional charge in response to a direct request from the jury, during the course of its deliberation, stated that it was not necessary for the defendant to have actual knowledge of the location of a defect and the leakage of gas from the service line; that it would be sufficient in order to make the defendant liable "if defendant had knowledge of facts and circumstances sufficiently pertinent in character to enable a reasonably cautious and prudent person engaged in the business of distributing natural gas to take notice that

said service line was leaking gas or was so defective that natural gas would imminently escape from some part of said line if it was immediately continued to be used to transport natural gas." The trial court repeatedly told the jury that, if they found knowledge of such facts and circumstances, then "it may be said that the defendant had knowledge of facts sufficient to cause it to reasonably act in some respect as to the service line in question." (R. 88, 89, 90, 99, 100, 101).

Respondent respectfully submits that such repeated charge by the trial court manifestly makes the dissenting opinion of Judge Gardner and the contention of the petitioners in their petition to this Court a misconstruction of the trial court's charge to the jury. A careful and complete reading of that charge clearly demonstrates that the jury was fully and fairly charged concerning the duty of the defendant, when the charge is read and considered in its entirety.

It should also be noted that the trial court, with full opportunity to observe and be fully acquainted of proceedings, including the jury's request for further instructions, was completely satisfied that the jury was not misled, under the evidence. That court made this statement to the jury after its verdict had been reported (R. 103):

> "* * * I say to you if I had been passing upon the facts in the case I would have returned the same kind of verdict under the facts here, because definitely there was no notice of any actual gas escaping made known to the defendant in this case. Nobody ever smelled any gas around this place and it seems with that kind of a break in the line there would have been certain disruptions sufficient so that somebody would have smelled gas there if there had been any gas escaping for a considerable period of time, and I don't think that defendant had any notice of a defect

in the line. Because one piece of pipe lying in the ground might be corroded so it has to be taken out does not necessarily indicate that all pipe in the same area is defective or requires the taking up of every other pipe in the neighborhood."

It is significant to note that he stressed that there was no evidence of any notice of any gas actually escaping and that no one was shown to have smelled any gas at this location. If, as contended by the plaintiffs, gas had been escaping from a hole as large as the one found in this pipe after the fire, plaintiffs' own experts had established that it would have been escaping under four pounds of pressure and that 4,100 cubic feet of gas per hour would have escaped from the pipe, if the soil had not been around it for a period of six months (R. 42) (S. R. 12). Yet, there was not one iota of testimony or evidence that gas was detected by anyone although the building was continuously in operation. It appears logical (as stated by the trial court in the above comment) that no such break could have existed without someone having detected the odor of gas.

It is also significant that the court stressed in the above comment that merely because one piece of pipe had been corroded to the extent it had to be removed, would not necessarily give notice that all pipe in the same area was defective. This was supported by the positive testimony of plaintiffs' own experts that corrosion is a varying process; that the rest of this pipe was in fairly sound condition; that a different degree of corrosion was encountered just twenty inches from this hole (R. 40) (S. R. 11); that even using a magnifying glass the hole in the elbow was the only hole in the pipe (S. R. 16).

The foregoing comment of the trial court was a sound analysis of the evidence. The jury's verdict clearly indi-

cates that they agreed. It demonstrates that a correct result was reached under the evidence in the trial of this case.

The Court of Appeals, in its opinion, stressed that the judgment of the trial court and its interpretation and application of the Missouri law should not be reversed unless it was shown that such interpretation was the result of "a clear misconception or misapplication * * * of local law" and that the burden of so demonstrating rests upon the appellant (A. 7). It obviously relied to a great degree (and properly so) upon the trial judge and his appraisal of the evidence, as demonstrated by the comment we have quoted. The Court of Appeals stressed that point in quoting verbatim from *Skelly Oil Co.* v. *Holloway et al.*, 8 Cir. 171 F.2d 670, as follows (A. 4):

> " 'The mere statement of the evidence shows how difficult it is for an appellate court to appraise it fairly from the printed record, and how important, if not decisive, in such an appraisal was the opportunity which the trial court had to hear and observe the witnesses on the stand. Obviously, the trial court might have resolved the issues of fact in favor of defendant. But we cannot say that the opposite conclusion is without substantial basis in the evidence or that upon a consideration of all of the evidence it is clearly erroneous.' "

So in this case, upon a consideration of all the evidence, it cannot be said that the judgment in the trial court was "clearly erroneous". On the contrary, it was supported by "substantial basis in the evidence".

Petitioners contend that the Court of Appeals' decision conflicts with the controlling state law as announced in *Golden* v. *National Utilities Co.*, 356 Mo. 84, 201 S.W.2d, and, in so doing, rely heavily upon the statement by Judge

Gardner in his dissenting opinion that the decision was contrary to the *Golden* case. A careful reading of the dissenting opinion of Judge Gardner reveals that he contended that the decision was contrary to the *Golden* case, because of his erroneous conclusion that the evidence established that defendant's "system included service lines and it had the exclusive right to maintain, inspect and control these lines, at least up to the property lines of the consumers. It, and not the plaintiffs, had all the attributes of ownership of its system of lines lying in the public street through which it transported its gas to consumers * * *." (A. 13). We believe that we have completely examined and discussed the evidence which demonstrates the misconstruction upon which such statement was made. However, relying upon that misinterpretation of the evidence, Judge Gardner then criticized a portion of the trial court's charge in the following language (A. 13):

> "In the instant case the court instructed the jury that:
>
> '* * * Under the law there was no duty or obligation on the part of the defendant to maintain the gas service line located between the shutoff cock and the curb on Moreau Street leading up to the meter next to the building, in a safe condition or to *make any physical inspection of that line to determine whether any gas was actually leaking from the line prior to the time of the occurrence in question.*'" [Emphasis supplied].

Yet, such portion of the charge was a correct statement of the Missouri law, under the evidence in this case. As previously pointed out, there was no evidence whatsoever of any ownership by the gas company or its predecessor. There was no evidence that the defendant's pred-

ecessor had installed the pipe. There was the positive evidence that its rights under the ordinance gave the predecessor no authority to install beyond the curbline. The rules and regulations themselves clearly showed that maintenance and ownership of a service pipe beyond the curbline was to be in the customer. As such there was no duty on the part of the gas company to make any physical inspection of the service line in question to determine whether gas was actually leaking from it. As was said in *Skelly Oil Co.* v. *Holloway*, 171 F.2d 670, 674:

> "Under the law of Missouri, in the absence of a contract so requiring, a distributor of gas is not charged with a duty of inspecting or maintaining privately owned service pipes or appliances in the buildings or on the property of its customers."

The Eighth Circuit in that case also pointed out that the duty of one distributing gas to the public is to exercise ordinary care, under the circumstances attending its operations, "to maintain its facilities" in a reasonably safe condition. That holding had repeatedly been restated by the Eighth Circuit in *Gas Service* v. *Helmers*, 179 F.2d 101; *Gas Service Co.* v. *Payton*, 180 F.2d 505; *Gas Service Co.* v. *London & Lancashire Insurance Co.*, 188 F.2d 404 and *London & Lancashire Insurance Co.* v. *Gas Service Co.*, 200 F.2d 783.

Petitioners have attempted repeatedly to escape the effect of this well established rule by arguing that all those cases dealt with a situation where the service line was within the customers' property line, whereas the service line in this case, even though owned by the customer, was located under the street. They have attempted to read into those decisions language distinguishing between pipes "on the property" and pipes "not on the property". It is respectfully submitted that none of these decisions

was based upon the *location* of the service pipe. All of them were decided on the fact of *ownership* of the pipe by the customer, regardless of its location. In all those cases it so happened that the customer's service line involved was within the customer's property line. The thinking of the Eighth Circuit in that connection was clearly demonstrated in the *London & Lancashire Insurance Co.* v. *Gas Service Co.*, case, *supra*, where it said, referring to a previous appeal of the case:

> "On appeal the judgment of the District Court was reversed and remanded for further proceedings on the ground that on the facts as established by the evidence the Gas Company was under no duty under a controlling Missouri law to inspect the *property owners' service line.*" [Emphasis supplied].

It should be noted that the court did not say that the gas company was under no duty to inspect the line on the property of the customer. Rather, it stated that it was under no duty to inspect the property owner's service line. It was, therefore, not error for the trial court to instruct the jury in this case that the gas company had no duty to inspect Martin's service pipe. That clearly is the law of Missouri.

What Judge Gardner did not consider, in ruling that the decision in the present case contravened the ruling in the *Golden* case, was the fact that the *Golden* case contained undisputed evidence that the service pipe which was defective was a pipe owned by the gas company. It was not a service pipe which, as here, was owned by the customer. There is no question but what, as to a pipe owned by it, a distributor of gas has a duty to inspect and maintain that line. It was on the basis of such proof of ownership by the gas company that the Supreme Court of Missouri, in the *Golden* case, held that:

"* * * Where there is a duty of finding out and knowing, negligent ignorance has the same effect in law as actual knowledge * * *."

The duty referred to by the court in the quoted portion of the opinion properly would exist where a gas company was shown to be the owner of the pipes which were found to be leaking, as was the defendant in the *Golden* case. Such ownership by the gas company also existed in the other cases cited and relied upon by petitioners, *Mesmer* v. *St. Louis County Gas Co.*, Mo.App., 42 S.W.2d 963 and *Barrickman* v. *National Utilities Co.*, Mo. App., 191 S.W.2d 265. All those cases are thus distinguished from the case at bar and from the case of *Skelly Oil Co.* v. *Holloway*, *supra*, and the cases following it, decided by the Eighth Circuit, which are cases controlling this case and announcing the applicable rule of law.

In addition to this it must be noted that Judge Gardner, in his dissent, limited his consideration of the trial court's charge to the above quoted portion. After thus correctly stating the law as to there being no continuing duty on the part of the defendant to inspect the service line in question, because it was owned by Mr. Martin, the trial court then proceeded carefully and meticulously, to instruct the jury as to the duty of the defendant if and after the defendant "had some knowledge of the leakage of gas from that particular service line, or notice of a defect in said line which would imminently cause gas to leak therefrom if it was not replaced or repaired * * *." (R. 87). With reference to such "knowledge" or "notice" the trial court repeatedly told the jury that "under the law it was not necessary that the defendant have actual knowledge of the location and size of the defect and leak of gas from the service line in question * * *." (R. 88). As previously set out herein, the court carefully told the jury

that it would be sufficient to show knowledge or notice on the part of the defendant, if it had "knowledge of facts and circumstances sufficiently pertinent in character to enable a reasonably cautious and prudent person engaged in the business of distributing natural gas to take notice that said service line was leaking gas or was so defective that natural gas would imminently escape from some part of said line * * *." (R. 88).

It is respectfully submitted that this portion of the court's charge completely and fully submitted the duty of the defendant; that it included the requested instruction offered by petitioners except that, instead of using the requested language "where a reasonable investigation would disclose the presence of an unsafe pipe." the trial court substituted the phrase "notice that said service line was leaking gas or was so defective that natural gas would imminently escape from some part of said line".

Petitioners next contend that the Court of Appeals' decision conflicts with controlling state law in taking the question of ownership and control from the jury and ruling as a matter of law that the pipe in question was owned by Mr. Martin. They have cited four cases which they say announced the law of the State of Missouri to be that ownership is a jury issue; that possession and control of property raises a presumption of ownership and that control is possession. They contend that the Court of Appeals ignored "the fact that defendant's franchise right to put its pipe in all streets of Tipton, was paramount to that of the abutting owner." They then rely heavily again upon the dissenting opinion of Judge Gardner, and, on Pages 10 and 11 of their petition, have quoted portions of that dissent, which we previously have demonstrated were based upon a misconstruction of the evidence. We will not burden the Court with a repetition of the facts

demonstrating this misconstruction, but respectfully refer it to what has previously been pointed out by us in that connection.

The record in this case was completely devoid of any evidence of company ownership of the pipe in question. Nor was there any evidence from which a presumption of ownership by the company could be raised which would supply a jury issue. Such a presumption cannot arise in the face of established facts. This is the settled law in the State of Missouri. Thus, in *Gregg* v. *Page*, Mo.App., 257 S.W.2d 161 (one of the cases cited and relied upon by petitioners), the court said:

> "Presumptions concerning title are never allowable against ascertained and established facts. Thus, a presumption of ownership from possession is not allowable against ascertained and established facts to the contrary.
>
> "We think that and similar language in other citations is another way of saying that such a presumption is rebuttable. All authorities agree that it is a rebuttable presumption * * *."

The established facts in the present case clearly showed ownership of the pipe in Mr. Martin. Defendant's Exhibit 31 (R. 62, 63), the ordinance of the City of Tipton adopted July 21, 1930, granted a franchise to the predecessor of this company to install and operate a gas plant and distributing system in that city. The franchise was for a period of twenty years after the date of passage of the ordinance. It remained in effect until it was replaced by Plaintiffs' Exhibit 30 (R. 61), Ordinance No. 221 of the City of Tipton passed May 3, 1948, which gave the defendant company a franchise for twenty years for the operation of such a system, and repealed the franchise granted by Defendant's Exhibit 31. We again quote Section 4 of

the original franchise ordinance which provided as follows:

> "Grantee shall furnish free of charge and install for his customers reliable meters or other instruments for the measurement of gas sold and shall keep the same in repair without cost to the customers; all meters or other devices used by the Grantee shall at all reasonable times be subject to inspection by the City and the City shall have the right to test such meters and devices at reasonable times. Grantee shall also furnish and install at his own expense proper and suitable and adequate service for each customer *from mains to the curb line, if such mains are located in the street,* and from mains to the property line, if the same be located in the alleys, and all such mains and laterals shall be adequate in size and construction." [Emphasis supplied].

Again we respectfully call attention to the fact that the specific wording of this franchise ordinance established that the predecessor company was neither obligated nor authorized to install service for any customer beyond the curb line, where the mains were located in the street. The main in question in this case was shown by all the evidence to be located in the street west of the Martin building.

Absent positive evidence to the contrary, how can it be presumed that the predecessor company would have undertaken to install service lines for a customer beyond the point authorized by the franchise? It is true that petitioners attempted to show, by the testimony of Mr. and Mrs. Hardy, that the predecessor company had, on occasion, installed customers' service lines (R. 49, 50). However, the original contract executed by Mr. Hardy with the predecessor company was offered in evidence as Defendant's Exhibit 33 (R. 139). Paragraph 2 of that exhibit provided as follows:

"Upon completion of said service line from Applicant's curb box to said basement, *Applicant agrees to accept the same as his sole property* and agrees that thereafter he will hold the Company free, clear and harmless from any and all liability, damage, charge, cost or expense by reason of accidents of every kind and nature resulting directly or indirectly from the use of said service line and conveying gas to Applicant's premises." [Emphasis supplied].

Under the quoted portions of that contract, even when the predecessor company did install a service line, it was installed under an agreement that the line would become the sole property of the customer after installation. Such contract proved nothing in the way of any obligation for maintenance or ownership of the line in question at the Martin building. On the contrary, it was evidence of lack of ownership or control.

Petitioners' evidence completely failed to contradict the franchise authority for installation only to the curb line. There was no evidence upon which to base any inference that the service line in question was installed by the predecessor of the defendant company. We again refer this Court to what previously has been said that the only witnesses offered by the petitioners during the trial of this case, Witnesses Brant and Thixton, gave no testimony on the question of when this particular service line was installed or on the question of who installed it. We also refer the Court to the testimony of Witness Lonnie Bell dealing with the installation of the meter on the west side of the building in 1939 (the very meter to which this service line was connected) and the fact that there was evidence then that the ground had been freshly dug up in that vicinity. Accordingly, all the evidence in this case prohibited a presumption of ownership in the defendant and was the basis upon which the trial court properly in-

structed the jury, as a matter of law, that ownership of the pipe in question was in Martin. The Court of Appeals on such evidence, also saw no reason to discuss the question of ownership in its opinion.

II.

Plaintiffs Were Not Deprived of Their Right of Review.

Under this point in their petition, the petitioners make a broad and sweeping statement that the Court of Appeals was guilty of "a clear abdication by that court of its lawful duty and function as a court of review." They appear to make this contention upon the basis that the opinion of the trial court fails to mention cases decided by the courts of the State of Missouri, which petitioners had contended were the controlling decisions in this case. Manifestly, however, no purpose would have been served, and it would unduly lengthen the opinion of the Court of Appeals to cite cases decided by the Missouri courts where those decisions were *not* controlling of issues in this case. Those decisions of the Missouri courts were not applicable to this case; they were not necessary to a decision in this case, and the statement made by Judge Gardner to the contrary in his dissenting opinion was, as previously pointed out, based upon a misconstruction of the evidence and a misconstruction of the trial court's charge.

This case was completely within the purview of the cases of *Skelly Oil Co.* v. *Holloway et al.*, 8 Cir., 171 F.2d 670; *Gas Service Co.* v. *Helmers*, 8 Cir., 179 F.2d 101 and *Gas Service Co.* v. *Payton*, 8 Cir., 180 F.2d 505, all cited by the Court of Appeals in its opinion. Each of those cases announced and followed the Missouri rule applicable in a case where the gas company does not own the pipe involved. Thus, in *Skelly Oil Co.* v. *Holloway, supra*, the

Court of Appeals announced the rule in the following language (l.c. 674):

> "Under the law of Missouri, in the absence of a contract so requiring, a distributor of gas is not charged with the duty of inspecting or maintaining privately owned service pipes or appliances in the buildings or on the property of its customers."

Petitioners contend that the *Skelly Oil Company* case was one "which, on its facts, was not remotely in point". On the contrary, respondent respectfully submits that, on the facts, the *Skelly Oil Company* case was directly in point. We believe that petitioners are led into their persistent contention that there was error both in the trial court and in the Court of Appeals, because of their unwillingness to accept, and their failure to admit, the distinction that exists between the established facts in the present case and the established facts in *Golden* v. *National Utilities Company, supra,* and those cases announcing the same rule of law. What petitioners fail to admit and accept is that the *Golden* case, and like cases, have dealt with the duty of a distributor of gas with reference to the distribution system and pipes *owned* by it, whereas the *Skelly Oil Company* case, and all cases in harmony with it, have dealt with a set of facts in which the pipe in question was *not owned* by the gas distributor. In the former case, *i.e.*, where the pipes are owned by the distributor, there is no question but what the distributor has a continuing duty to inspect and determine the condition of the pipes. In the latter situation, *i.e.*, where pipes are not owned by the distributing company, the distributor has no duty to inspect or maintain such pipes. In the latter cases it is *only* where the distributor has knowledge of circumstances which should be notice to it that there might be a leak of gas in the customer's pipe that it may

be held liable for failure to act. That matter was fully covered by the trial court in his charge to the jury, as stated by the Court of Appeals in its original opinion. Ownership in Mr. Martin having been established by the evidence, there was no reason for the court to discuss either the *Golden* case or any of the other cases decided in accordance with it. In such circumstances, petitioners had an adequate and complete review of their case by the Court of Appeals. Judge Gardner's dissent, based as it was upon a misconstruction of the evidence, undoubtedly led to the petition to this Court. However, petitioners have fallen into the same error which is apparent in the dissenting opinion of that Judge in overlooking and in failing to recognize the positive evidence refuting ownership by the gas company of the pipe in question. The majority of the Court of Appeals obviously recognize this error because they refused, unanimously, to grant a rehearing.

CONCLUSION.

For all the foregoing reasons, it is respectfully submitted that the petition should be refused and that no writ should issue in this case.

Respectfully submitted,

CHARLES M. MILLER,
JERRY T. DUGGAN,
DON M. JACKSON,
Counsel for Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

No. [illegible]

[illegible],
Petitioner,

vs.

THE GAS SERVICE COMPANY,
Respondent.

ALFRED P. MARTIN,
Petitioner,

vs.

THE GAS SERVICE COMPANY,
Respondent.

BILTWELL COMPANY, INC., TIPTON MANUFACTURING CO., GLENRIDGE TROUSERS COMPANY, and EMBASSY MANUFACTURING COMPANY, *Petitioners*,

vs.

THE GAS SERVICE COMPANY,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 501.

NAOMI WOOD,
Petitioner,

vs.

THE GAS SERVICE COMPANY,
Respondent.

ALFRED F. MARTIN,
Petitioner,

vs.

THE GAS SERVICE COMPANY,
Respondent.

BILTWELL COMPANY, INC., TIPTON MANUFACTURING CO., GLENRIDGE TROUSERS COMPANY, and EMBASSY MANUFACTURING COMPANY, *Petitioners,*

vs.

THE GAS SERVICE COMPANY,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully pray for a rehearing of the order denying a writ of certiorari entered in these causes on November 25, 1957.

This petition is filed pursuant to Rule 58 of this Court and is based on the following grounds available to, but not previously presented by, petitioners:

I.

The Court of Appeals for the Eighth Circuit Habitually Applies a Rule of Appellate Review Which (1) Conflicts with the Decisions of This Court, (2) Conflicts with the Practice of All Other Circuits, and (3) Destroys the Fundamental Right of Appeal in All Cases in Which It Is Used by Making the Federal Trial Judges in Effect the Final Arbiters of Local Law.

In this case the Court of Appeals used the "rule of deference" to affirm a judgment that was contrary to the controlling Missouri law, pointing out that the question was "not whether the conclusion of the trial court as to a question of local law is necessarily *correct*, but whether the Court reached a *permissible* conclusion." (245 F. 2d 653, 657) (Emphasis ours).

The Eighth Circuit Court of Appeals admits that its rule does not require the application of the "correct" rule of law (*National Bellas Hess, Inc.*, v. *Kalis*, 191 F. 2d 739; *Guyer* v. *Elger*, 216 F. 2d 537, 540; *Milwaukee Ins. Co.* v. *Kogen*, 240 F. 2d 613, 615; the case at bar, 245 F. 2d 653, 657); it will affirm the trial court even though it may think the law is or might be otherwise (*Western Casualty & Surety Co.* v. *Coleman*, 186 F. 2d 40, 43; *Buder* v. *Becker*, 185 F. 2d 311, 315).

Obviously, a rule of appellate practice which permits affirmance of a trial court's judgment though not "necessarily correct," thwarts the very purpose of review, namely, to correct miscarriages of justice resulting from an incorrect interpretation of the law. If there be a right of

appeal at all, there must be only one permissible conclusion, and that is the correct and just conclusion *as determined by the Appellate Court by the exercise of its independent judgment.*

The Court of Appeals for the Eighth Circuit habitually uses this device to evade its duty to determine the state law. *There is not a single case in all the other nine circuits where the rule has been used to affirm; yet it has been so used in no less than 54 cases in the Eighth Circuit since 1943.*[1]

This situation is one of grave concern to the litigants and appellate bar of Missouri. It has been the subject of

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[1]*Magill* v. *Travelers Ins. Co.*, 133 F.2d 709, 713; *Doering* v. *Buechler*, 146 F.2d 784, 788; *Railway Mail Ass'n* v. *Chamberlin*, 148 F.2d 206, 208; *Russell* v. *Turner*, 148 F.2d 562, 564; *Globe Indemnity Co.* v. *Wolcott & Lincoln, Inc.*, 152 F.2d 545, 547; *Anderson-Tully Co.* v. *Murphree*, 153 F.2d 874, 877; *Michigan Fire & Marine Ins. Co.* v. *National Surety Corp.*, 156 F.2d 329, 333; *Central Nebraska Public Power & Irrigation Dist.* v. *Tobin Quarries, Inc.*, 157 F.2d 482, 483; *Elder* v. *Dixie Greyhound Lines, Inc.*, 158 F.2d 200, 205; *Abbott* v. *Arkansas Utilities Co.*, 165 F.2d 339, 340; *Zuckerman* v. *McCulley*, 170 F.2d 1015, 1019; *Heikes* v. *New York Life Ins. Co.*, 171 F.2d 460, 464; *Mast* v. *Illinois Central R. Co.*, 176 F.2d 157, 163; *Traders & General Ins. Co.* v. *Powell*, 177 F.2d 660, 668; *Brink's, Inc.*, v. *Hoyt*, 179 F.2d 355, 359; *Northern Liquid Gas Co.* v. *Hildreth*, 180 F.2d 330, 336; *Pendergrass* v. *New York Life Ins. Co.*, 181 F.2d 136, 141; *Morgan* v. *Finnegan*, 182 F.2d 649, 650; *Nolley* v. *Chicago, M., St. P. & P. R. Co.*, 183 F.2d 566, 572; *Buder* v. *Becker*, 185 F.2d 311; *Maryland Casualty Co.* v. *Dalton Coal & Material Co.*, 184 F.2d 181, 183; *New York Cas. Co.* v. *Lewellen*, 184 F.2d 891, 894; *Fargo Nat. Bank* v. *Agricultural Ins. Co.*, 184 F.2d 676, 683; *Standard Brands, Inc.*, v. *Bateman*, 184 F.2d 1002, 1011; *Fireman's Fund Ins. Co.* v. *Vernes Credit Jewelry*, 185 F.2d 142, 146; *Western Casualty & Surety Co.* v. *Coleman*, 186 F.2d 40, 43; *John Hancock Mut. Life Ins. Co.* v. *Munn*, 188 F.2d 1, 4; *Nordin* v. *May*, 188 F.2d 411, 415; *National Bellas Hess, Inc.*, v. *Kalis*, 191 F.2d 739, 741; *Mutual Ben. Health & Accident Ass'n* v. *Cohen*, 194 F.2d 232, 241; *Ortman* v.

attack before[2], but never in a case where, as here, the result was in conflict with the clear holding of the State Supreme Court, and the result was reached without even investigating or discussing the state law.[3]

Smith, 198 F.2d 123, 127; *Cohn* v. *Little*, 199 F.2d 28, 31; *Coca-Cola Bottling Co. of Black Hills* v. *Hubbard*, 203 F.2d 859, 861; *Franck* v. *Equitable Life Ins. Co.*, 203 F.2d 473, 477; *Kimble* v. *Willey*, 204 F.2d 238, 243; *Hartford Acc. & Ind. Co.* v. *Federal Deposit Ins. Corp.*, 204 F.2d 933, 936; *Bettinger* v. *Northwestern Nat. Cas. Co. et al.*, 213 F.2d 200, 206; *Riteway Carriers* v. *Stuyvesant Ins. Co.*, 213 F.2d 576, 578; *Guyer* v. *Elger*, 216 F.2d 537, 540, cert. den. 348 U.S. 929; *Bryant* v. *Chicago Mill & Lumber Co.*, 216 F.2d 727, 734; *Lanza* v. *Carroll*, 216 F.2d 808, 814; *Am. Natl. Bank of St. Paul* v. *Nat'l Ind. Co.*, 222 F.2d 513, 519; *Chicago & Nat'l Western Railway Co.* v. *Bork*, 223 F.2d 652, 657; *Citizens Ins. Co. of N. J.* v. *Foxbilt, Inc.*, 226 F.2d 641, 643; *Frank B. Connet Lumber Co.* v. *New Amsterdam Cas. Co.*, 236 F.2d 117, 125; *Grundeen* v. *U. S. F. & G. Co.*, 238 F.2d 750, 753; *Bostian* v. *Universal C. I. T. Credit Corporation*, 238 F.2d 809, 812; *Dangaard* v. *Hawkeye Security Ins. Co.*, 239 F.2d 351, 355; *Milwaukee Ins. Co.* v. *Kogen*, 240 F.2d 613, 615; *Holzer* v. *United States*, 244 F.2d 562, 564; *Western Oil and Fuel Co.* v. *Kemp*, 245 F.2d 633, 645; *Anderson* v. *Rosebean*, 245 F.2d 673, 675.

[2]*Nat'l Bellas Hess, Inc.*, v. *Kalis*, 191 F. 2d 739, cert. den. 342 U.S. 933; *Mutual Ben. H. & A. Assn.* v. *Cohen*, 194 F.2d 232, cert. den. 343 U.S. 965. In the former case the petitioner aptly said:

> "* * * This case involves not an isolated situation but rather a widely applied rule that has pervaded the entire fabric of appellate practice in the Eighth Circuit."

[3]Gardner, Chief Judge, who joined initially in the judgment affirming, and therefore presumably knew whereof he spoke, said:

> "Manifestly, there is no dearth of authority in the decisions of the Supreme Court of Missouri on the questions here involved. *Nevertheless, the court in its decision did not consider these controlling authorities but instead accepted the views of the trial judge—thus, in effect, depriving appellants of their right of review by this court.*" (248 F.2d 683; page A17 of the Petition for Writ) (Emphasis ours).

1. The Eighth Circuit rule is in conflict with decisions of this Court.

The Eighth Circuit Court of Appeals has attempted to justify its repeated evasion of its judicial duty on the basis of certain language used by this Court (*Buder* v. *Becker*, 8 Cir., 185 F.2d 311, 315, Footnote 2), for example, this Court's statement (*MacGregor* v. *State Mutual Life Assurance Co.*, 315 U.S. 280, 281) that it would "leave undisturbed the interpretation placed upon purely local law by a Michigan Federal judge of long experience and by three Circuit judges."

Although the Eighth Circuit Court of Appeals may have been misled by such language, it is obvious that this Court never intended the various Courts of Appeals to surrender their function to the trial court. In *Huddleston* v. *Dwyer*, 322 U.S. 232, 236, this Court held, "*It is the duty of the Federal Appellate Courts, as well as the trial court, to ascertain and apply the state law* (emphasis ours)," and returned the case to the Court of Appeals requiring it to apply the state law (which is exactly what we are asking the Court to do in the case at bar). We do not believe that the *MacGregor* case, *supra*, or any other case of this Court relied upon by the Eighth Circuit Court of Appeals, was intended to circumscribe the scope of review by a Court of Appeals.

If language of this Court has misled, then this Court should grant certiorari and clarify the situation for the benefit of litigants in the Eighth Circuit and rectify the intolerable situation existing there.

2. The rule applied by the Eighth Circuit Court of Appeals is in conflict with the decisions of all the other Circuit Courts of Appeals.

Contrary to the practice of the Court of Appeals for the Eighth Circuit, all the other nine courts of appeals have accepted and followed the ruling of this Court in *Huddleston v. Dwyer*, 322 U.S. 232, 236, *supra*.

The First Circuit, in *Boston Casualty Co.* v. *Bath Iron Works Corp.*, 1 Cir., 136 F.2d 31, 33, held that "*our* only inquiry * * * is to determine whether a cause of action is stated under Maine law." (Emphasis ours).

The Second Circuit's rule is stated in *Cooper* v. *American Airlines*, 2 Cir., 149 F.2d 355, 357-8, and *Janes* v. *Sackman Bros. Co.*, 2 Cir., 177 F.2d 928, 932-3. In the latter case the court held: "We agree that to refrain from deciding, as best *we* may, the state issues presented to *us* 'would be to enervate diversity jurisdiction.' *Propper* v. *Clark*, 337 U.S. 472, 489, 490" (Emphasis ours).

The Third Circuit, in *Barrett* v. *Denver Tramway Corporation*, 3 Cir., 146 F.2d 701, 702, held that "Delaware law controls the issue and it is *our duty*, as it was the duty of the trial court, to ascertain and apply the law of that state" (emphasis ours). See also statement in *Stentor Electric Mfg. Co.* v. *Klaxon Co.*, 3 Cir., 125 F.2d 820, 823-4, upon remand from this Court (313 U.S. 487).

The Fourth Circuit, in *New England Mut. Life Ins. Co.* v. *Mitchell*, 4 Cir., 118 F.2d 414, 420, that "in ascertaining the applicable law of the state, *we* are to consider court decisions and other available sources of local law; and *we* are to apply court decisions in the light of the well-established state decisions rule and its limitations" (Emphasis ours).

The Fifth Circuit, in *Holliday* v. *Wade*, 5 Cir., 117 F.2d 154, 156, held that "the court, *as the appellate tribunal for*

this case, must assume the duty the Supreme Court of Florida would have if the case were before it * * *" (Emphasis ours).

The Sixth Circuit, in *Egyptian Supply Co.* v. *Boyd*, 6 Cir., 117 F.2d 608, 612, held that "this court will exercise an *independent judgment* in determining the law with respect to the issue here presented based upon whatever principles of state law are applicable" (Emphasis ours). See also *Maryland Casualty Co.* v. *Cassetty*, 6 Cir., 119 F.2d 602, 605.

The Seventh Circuit, in *Chicago, Wilmington & Franklin Coal Co.* v. *Herr*, 7 Cir., 127 F.2d 1010, cert. denied 317 U.S. 669, held that "it is our duty to ascertain from all the available data what the state law is and apply it." (l.c. 1011 of 127 F.2d, Emphasis ours).

The same rule is applied in the Ninth Circuit (*Hughes* v. *Mutual Life Ins. Co. of New York*, 9 Cir., 180 F.2d 542, 545) and in the Tenth Circuit (*Versluis* v. *Town of Haskell, Okla.*, 10 Cir., 154 F.2d 935, 937).

3. An appeal in which the Eighth Circuit Court of Appeals applies the rule of deference is, in fact, no appeal at all.

An appeal to a Court which does not, first, examine the applicable law and, secondly, make its own decision as to what that law is, is no appeal at all. The Eighth Circuit Court of Appeals began eliminating the second step in 1943 when it first applied the "rule of deference." In the case at bar, as evidenced by the opinion of the Eighth Circuit Court of Appeals, both steps have been eliminated, the Court apparently reasoning that, if it is going to adopt the trial court's interpretation of the law in any event, there is no need to take the time of the Court or lengthen

the opinion by an examination and discussion of the Missouri law.

In the State of Missouri alone there are six District judges. At the present time each judge could apply a different interpretation of a particular principle of state law and each would be affirmed so long as the interpretation were permissible, though not necessarily correct. In fact, the same District judge could apply different rules in various cases involving the same issues of law. Multiply by the number of states in the circuit and it becomes at once apparent that utter confusion will replace stability of the law.

It is respectfully submitted that the rule of deference as repeatedly applied by the Eighth Circuit Court of Appeals is a contrivance whereby that Court avoids its judicial duty to make an independent decision as to the state law, at the cost to Eighth Circuit litigants of not only their right to have state law applied, but of their fundamental right of appeal. The situation should be corrected *now*. The corrosive effect on the judicial structure ought to be halted without further delay.

Even though this Court is heavily burdened, this is a matter that cries for its attention, because only this Court, by granting certiorari, can guarantee to Eighth Circuit litigants equal justice under the law, restore to them their right of appeal, and reestablish stability of law in diversity cases.

For these reasons, as well as for the reasons set out in the petition for writ of certiorari, it is respectfully sub-

mitted that this petition should be granted and the Writ issue.

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J. D. JAMES,
Counsel for Petitioners.

It is hereby certified by the undersigned that this petition is presented in good faith and not for delay, and that the petition is restricted to substantial grounds available to petitioners although not previously presented.

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Attorney for Petitioners.